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UNITED STATES REPORTS

VOLUME 447

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1979

JUNE 9 THROUGH JUNE 23, 1980

HENRY C. LIND
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

UNITED STATES *v.* CALIFORNIA

ON EXCEPTION TO REPORT OF SPECIAL MASTER

No. 5, Orig. Argued March 17, 1980—Decided June 9, 1980

The issue presented at this stage of this original action is whether—for purposes of determining California's ownership under the Submerged Lands Act of submerged lands and natural resources lying within three geographical miles seaward of the California coastline—the coastline follows the mean lower low-water line along the natural shore, or whether it follows the seaward edge of 15 piers and the Rincon Island complex projecting into the sea from the shore. Rincon Island, a privately owned artificial "island" used to service offshore oil facilities, is erected upon foundations resting on the ocean floor, has a dock on the seaward side, and is connected to the mainland by a causeway structure under which water flows freely. Neither the causeway nor the island have had any noticeable effect on the shoreline, and the complex is not a coast protective work. The piers in question, some of which are privately owned and some of which are operated by the State as docking facilities or for recreational purposes, are all attached to the mainland; water flows freely underneath each; they have no effect on the shoreline and are not coast protective works. The Special Master concluded that the piers and the Rincon Island complex do not constitute extensions of the coast and that the coastline follows the natural coast in the vicinity of these structures. California filed an exception to the Master's report.

Held: The Special Master's conclusion is proper. Under the Convention on the Territorial Sea and the Contiguous Zone, which is used for guidance

in defining "coastline" for purposes of the Submerged Lands Act, the general rule expressed in Art. 3 therein is that the "normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." Although the type of construction of the open piers involved here, being elevated above the ocean's surface on pilings, does not, without more, require a determination adverse to California, the absence of a "lower low-water line" deprives them of a "normal baseline," and precludes them from falling within the ambit of Art. 3. Moreover, Art. 8 of the Convention, whereby "the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast," does not encompass all structures erected on the shore. The structures in this case are not harbors and are not a part of outermost "harbour works," since they neither "protect," "enclose," nor "shelter," *Louisiana Boundary Case*, 394 U. S. 11, 37, n. 42, and thus they cannot constitute an integral part of a harbor system. Nor does the Longshoremen's and Harbor Workers' Compensation Act and decisions thereunder indicate that Congress has withdrawn from the courts the authority to define "coastline" for purposes of the Submerged Lands Act. Pp. 5–9.

Exception to Special Master's report overruled.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL, J., who took no part in the consideration or decision of the case.

John Briscoe, Deputy Attorney General of California, argued the cause for defendant. With him on the briefs were *George Deukmejian*, Attorney General, *N. Gregory Taylor*, Assistant Attorney General, and *Nancy A. Saggese*, Deputy Attorney General.

Stephen M. Shapiro argued the cause for the United States. On the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Allan A. Ryan, Jr., Bruce C. Rashkow*, and *Michael W. Reed*.*

**Avrum M. Gross*, Attorney General, and *G. Thomas Koester*, Assistant Attorney General, filed an *amicus curiae* brief for the State of Alaska.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

I

The United States began this original action against the State of California under Art. III, § 2, of the Constitution in 1945 to determine whether the right to exploit natural resources under the submerged lands off the California coast belongs to the United States or to California.

In 1947, this Court decreed that the United States owned all submerged lands extending seaward of the ordinary low-water mark on the California coast. *United States* v. *California*, 332 U. S. 804, 805. See also *United States* v. *California*, 332 U. S. 19 (1947). When Congress enacted the Submerged Lands Act of 1953, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, the United States, in effect, quitclaimed to California whatever interest the Federal Government may have had in, and to, all lands and natural resources lying within three geographical miles seaward of the California coastline. § 3 (b)(1), 43 U. S. C. § 1311 (b)(1). Congress subsequently enacted the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.*, which declared that the United States owned all submerged lands seaward of those granted to California by the Submerged Lands Act. §§ 1332, 1333.

In 1978, the parties filed cross-motions for entry of a supplemental decree. Although those motions proposed three issues for resolution, only one is presently before the Court.[1] That issue is whether the coastline follows the mean lower low-water line along the natural shore, or whether it follows the seaward edge of 15 piers and the Rincon Island complex projecting into the sea from the shore.

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[1] The other issues involve the location of the seaward limit of inland waters at the Port of San Pedro and at the mouth of San Diego Bay. The parties acquiesce in the Master's conclusion as to these issues and anticipate their resolution by agreement.

This Court appointed a Special Master who received evidence and submitted recommendations. The Master made the following findings of fact:

Rincon Island is a privately owned artificial "island" off the shore near Punta Gorda, Ventura County, which is used to service offshore oil facilities. It is built upon large concrete tetrapods [2] which rest on the ocean floor, and it has a surface consisting of rock and dirt fill. There are buildings and other structures on the island, all of which are related to an active oil well. On the seaward side of the island is a large dock equipped with hardware for the berthing of vessels.

The island is connected to the mainland by a structure commonly known and identified on maps as the Punta Gorda Causeway. Oil is pumped to shore by a pipeline running beneath and alongside the causeway structure. The wooden causeway deck surface rests on a steel frame supported by pilings filled with gravel and capped with concrete. Water flows freely underneath. Neither the structure nor the island has had any noticeable effect on the shoreline, and the complex is not a coast protective work.[3]

The 15 piers have asphalt, wood, or concrete deck surfaces mounted on precast concrete, steel, or wood pilings. They vary in length from 500 feet (at the Santa Barbara Biltmore Hotel) to 3,500 feet (at Ocean Beach). All are attached to the mainland, and water flows freely underneath each. The piers have no effect on the shoreline; they are not coast protective works. One pier is privately owned by a hotel; 3 others are privately owned and used to supply offshore oil rigs; the remaining 11 are operated by the California State

[2] These blocks resemble giant versions of a child's "jacks."

[3] As the Master correctly noted, "Rincon Island could not qualify as an 'island' for purposes of delimiting the territorial sea under the Geneva Convention because it is an artificial island." See Art. 10, Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U. S. T. 1606, T. I. A. S. No. 5369. For all intents and purposes, then, the island complex is treated the same as the piers at issue.

Department of Parks and Recreation as docking facilities or for recreational purposes.[4]

The Special Master concluded that neither the Rincon Island complex nor the piers constitute extensions of the coast.[5] The California coastline, he determined, follows the natural coast in the vicinity of these structures for purposes of measuring to the federal-state boundary under the Submerged Lands Act. California filed an exception to the Master's conclusion.

II

Since passage of the Submerged Lands Act granting California and other States ownership of submerged lands within three miles of their respective coasts, this Court has adverted to the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U. S. T. 1606, T. I. A. S. No. 5369, for guidance in the definition of the term "coastline." See *Louisiana Boundary Case*, 394 U. S. 11 (1969); *United States* v. *California*, 381 U. S. 139, 165 (1965). The definitional contexts tend to be highly fact bound,[6] and the Convention provides no rule for automatic application. The Submerged Lands Act does not indicate whether the word "coast" was intended by Congress to encompass only the natural shore, or to include structures extending seaward from shore. Although we have recognized in earlier proceedings of this case that some kinds of structures may modify the

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[4] The piers are not unlike fishing piers found in many coastal areas.

[5] The Master noted that though some shipping is handled at some of the piers, it is insufficient to justify defining them as "ports." For example, one of them is fitted with a coin-operated davit for lowering small boats into the water. We agree with this conclusion. The island, as an island, was disqualified from serving as a base point for measuring the territorial sea because of its artificiality. See n. 3, *supra*.

[6] For other discussions on the significance of factual distinctions and their attendant implications among jetties, groins, breakwaters, and spoil banks, see *Texas* v. *Louisiana*, 426 U. S. 465, 469, and n. 3 (1976); *United States* v. *Louisiana*, 389 U. S. 155, 158 (1967).

California coastline, see the 1977 decree, 432 U. S. 40, this Court has never adopted a view that all structures erected on the coast may be considered extensions of the coast.

Open piers, such as those at issue here, are elevated above the surface of the ocean on pilings. Accordingly, they do not conform to the general rule for establishing a baseline from which to measure the extent of a coastal state's jurisdiction. That rule, contained in Art. 3 of the Convention, states:

> "[T]he normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

The type of construction of the piers does not, without more, require a determination adverse to California. See, *e. g.*, *United States* v. *California*, 381 U. S., at 176–177. But the absence of a "lower low-water line" deprives the piers of a "normal baseline," and precludes them from falling within the ambit of Art. 3.

The ultimate conclusion of the Special Master implicitly recognizes this proposition. He did not view the discontinuity of the waterline as dispositive, correctly noting that some breakwaters, for example, also have discontinuous waterlines, and have been held to be part of the coastline. But by considering and disposing of California's claim under Art. 8 of the Convention, in effect on exception to the general rule embodied in Art. 3, see discussion *infra*, he necessarily found the criteria of Art. 3 were not satisfied.

The fact that every National Ocean Survey chart of the California coast "officially recognized" by the United States displays a black line connoting the coastal low-water mark following the configuration of the seaward edge of the 16 structures, as it does groins, breakwaters, and other structures that extend seaward, is likewise not dispositive. We agree with the Master's finding that the charts contain an aggregate of errors and in many places depict the territorial sea without

regard to the coastline. And each chart, as the Master found, includes a disclaimer to that effect.

California suggests that Art. 8 of the Convention also affords support for its position. Article 8 provides:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

Although in an earlier stage of this litigation we incorporated this text into the decree, 382 U. S. 448, 449 (1966), we did not construe the language as encompassing all structures erected on the shore.

The piers and the island complex involved in this case are not a part of outermost harbor works; nor do they form an integral part of a harbor system. We held in the *Louisiana Boundary Case, supra,* that the term "harbour works" refers to " '[s]tructures erected along the seacoast at inlets or rivers for protective purposes, or for enclosing sea areas adjacent to the coast to provide anchorage and shelter.' " 394 U. S., at 37, n. 42.[7] These structures neither "protect," "enclose," nor "shelter";[8] they do not constitute harbor works within the meaning of Art. 8.

A "harbor" under Art. 8 is a body of water providing a haven for safe anchorage and shelter for vessels. See *Louisiana Boundary Case, supra,* at 37, n. 42, citing 1 A. Shalo-

[7] In ruling in the *Boundary Case* that Louisiana's dredged channels were not "harbour works," we said:

". . . Article 8 applies only to raised structures. The discussions of the Article by the 1958 Geneva Conference and the International Law Commission reveal that the term 'harbour works' connoted 'structures' and 'installations' which were 'part of the land' *and which in some sense enclosed and sheltered the waters within.*" 394 U. S., at 36–37 (emphasis added).

[8] California's coastal engineering expert testified that these piers are designed to have no effect on the movement of the sea. By contrast, groins and jetties are intended to affect wave action.

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witz, Shore and Sea Boundaries 60, n. 65 (1962). That the piers and the Rincon Island complex provide no protection has been noted; that they are not bodies of water states the obvious. It follows that since the structures are neither harbor works nor harbors, they cannot constitute an integral part of a harbor system.

The State seeks to import language from the International Law Commission's Commentary to the final draft of Art. 8, primarily Comment 2, Report of the International Law Commission to the General Assembly, U. N. Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9, U. N. Doc. A/3159, p. 16 (1956), as support for its position that Art. 8 should be construed to cover these structures. Comment 2 states:

> "Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works."

Comment 2 has been held to envision erosion jetties, but we have highlighted the beach protection or harbor protection role they fulfill as well. *Louisiana Boundary Case, supra,* at 49–50, n. 64. A construction of the Comment as including these piers and the island complex which concededly do not fulfill such a role would unwarrantedly extend the most generous intimation of the Comment.[9]

Finally, the State relies upon decisions in which the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*, was applied to accidents which occurred on piers as evidence that Congress intended domestic rather than admiralty law to control judicial construction of

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[9] Even if we were to assume, as did the Master, that "jetties" means "piers," we would also agree with his conclusion, as we have, that these piers do not fall within Art. 8 because they are not part of a harbor or harbor system. But in light of our disposition it is unnecessary, and we decline, to join the dispute between the parties over the precise definition of "jetties" as contained in the English and French versions of the Convention.

the Submerged Lands Act. *E. g., Nacirema Co.* v. *Johnson,* 396 U. S. 212 (1969); *Travelers Insurance Co.* v. *Shea,* 382 F. 2d 344 (CA5 1967); *Michigan Mutual Liability Co.* v. *Arrien,* 344 F. 2d 640 (CA2 1965); *East* v. *Oosting,* 245 F. Supp. 51 (ED Va. 1965); *Johnson* v. *Traynor,* 243 F. Supp. 184 (Md. 1965). It suggests this is at least an implicit congressional declaration that piers are land, and are thus part of the coastline. However, in an earlier incarnation of this case, we held to the contrary. *United States* v. *California,* 381 U. S., at 150–154; see also, *Louisiana Boundary Case, supra,* at 19. Nothing that has occurred since that ruling indicates that Congress has withdrawn from the courts the authority to define "coastline." We have looked to the Convention to give content to the Submerged Lands Act; no reason is advanced which persuades us to do otherwise today.

The exception of the State of California to the report of the Special Master is overruled. The Special Master shall prepare a proposed form of decree consistent with this opinion and present it to this Court for entry in due course.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

STANDEFER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-383. Argued April 14, 1980—Decided June 9, 1980

Petitioner was indicted for, *inter alia*, aiding and abetting a named Internal Revenue Service agent in accepting unlawful compensation, in violation of 26 U. S. C. § 7214 (a) (2) and 18 U. S. C. § 2, which provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. Prior to the indictment, the IRS agent was acquitted of certain of the § 7214 (a) (2) violations which petitioner was accused of aiding and abetting. Petitioner moved to dismiss his indictment as to aiding and abetting these violations on the ground that since the agent had been acquitted of such violations, petitioner could not be convicted of aiding and abetting them. The District Court denied the motion, and after trial petitioner was convicted. The Court of Appeals affirmed.

Held: A defendant accused of aiding and abetting in the commission of a federal offense may properly be convicted despite the prior acquittal of the alleged actual perpetrator of the offense. Pp. 14–26.

(a) Read against its common-law background, 18 U. S. C. § 2 evinces a clear congressional intent to permit such a conviction. The section gives general effect to what had always been the common-law rule for second-degree principals (principals who were actually or constructively present at the scene of the crime and aided and abetted its commission) and for all misdemeanants. The legislative history of § 2 confirms this understanding. With the enactment of § 2, all participants in conduct violating a federal criminal statute are "principals," and as such they are punishable for their criminal conduct, the fate of other participants being irrelevant. Pp. 15–20.

(b) The Government is not barred, under the doctrine of nonmutual collateral estoppel, from relitigating the issue of whether the IRS agent accepted unlawful compensation. Application of that doctrine is not appropriate here. In a criminal case, the Government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. The application of collateral estoppel in criminal cases is also complicated by rules of evidence and exclusion unique to criminal law. Finally, in this case the important federal interest in the enforce-

ment of the criminal law outweighs the economy concerns undergirding the collateral estoppel doctrine. Pp. 21–25.

610 F. 2d 1076, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Harold Gondelman argued the cause and filed briefs for petitioner.

William Alsup argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann,* and *Deputy Solicitor General Frey.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to decide whether a defendant accused of aiding and abetting in the commission of a federal offense may be convicted after the named principal has been acquitted of that offense.

I

In June 1977, petitioner Standefer was indicted on four counts of making gifts to a public official, in violation of 18 U. S. C. § 201 (f), and on five counts of aiding and abetting a revenue official in accepting compensation in addition to that authorized by law, in violation of 26 U. S. C. § 7214 (a)(2) and 18 U. S. C. § 2.[1] The indictment charged that

[1] Title 18 U. S. C. § 201 (f) provides, in relevant part, as follows:

"Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . [is guilty of an offense]."

Title 26 U. S. C. § 7214 (a)(2) punishes:

"Any officer or employee of the United States acting in connection with any revenue law of the United States . . . who knowingly demands other or greater sums than are authorized by law, or receives any fee, compen-

petitioner, as head of Gulf Oil Corp.'s tax department, had authorized payments for five vacation trips to Cyril Niederberger, who then was the Internal Revenue Service agent in charge of the audits of Gulf's federal income tax returns.[2] Specifically, the indictment alleged that Gulf, on petitioner's authorization, had paid for vacations for Niederberger in Pompano Beach (July 1971), Miami (January 1973), Absecon (August–September 1973), Pebble Beach (April 1974), and Las Vegas (June 1974). The four counts under 18 U. S. C. § 201 (f) related to the Miami, Absecon, Pebble Beach, and Las Vegas vacations; the five counts under 26 U. S. C. § 7214 (a)(2) and 18 U. S. C. § 2 were one for each vacation.[3]

Prior to the filing of this indictment, Niederberger was separately charged in a 10-count indictment—two counts for each of the five vacations—with violating 18 U. S. C. § 201 (g)[4] and 26 U. S. C. § 7214 (a)(2). In February 1977, Niederberger was tried on these charges. He was convicted on four counts of violating § 201 (g) in connection with the vacations in Miami, Absecon, Pebble Beach, and Las Vegas and of

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sation, or reward, except as by law prescribed, for the performance of any duty."

Title 18 U. S. C. § 2 provides in relevant part:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

[2] The indictment also named Gulf Oil Corp. and Joseph Fitzgerald, a manager in Gulf's tax department, as defendants. Gulf pleaded guilty and Fitzgerald *nolo contendere* to all nine counts.

[3] It appears that the statute of limitations had run on any violation of 18 U. S. C. § 201 (f) in connection with the Pompano Beach vacation.

[4] Title 18 U. S. C. § 201 (g) punishes:

"Whoever, being a public official . . . , otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him."

two counts of violating § 7214 (a)(2) for the Pebble Beach and Las Vegas trips. He was acquitted on the § 201 (g) count involving the Pompano Beach trip and on the three counts under § 7214 (a)(2) charging him with accepting payments from Gulf for trips to Pompano Beach, Miami, and Absecon.[5]

In July 1977, following Niederberger's trial and before the trial in his own case commenced, petitioner moved to dismiss the counts under § 7214 (a)(2) and 18 U. S. C. § 2 which charged him with aiding and abetting Niederberger in connection with the Pompano Beach, Miami, and Absecon vacations. Petitioner argued that because Niederberger, the only named principal, had been acquitted of accepting unlawful compensation as to those vacations, he could not be convicted of aiding and abetting in the commission of those offenses. The District Court denied the motion.

Petitioner's case then proceeded to trial on all nine counts. At trial, petitioner admitted authorizing payment for all five vacation trips, but testified that the trips were purely social and not designed to influence Niederberger in the performance of his official duties. The jury returned guilty verdicts on all nine counts.[6] Petitioner was sentenced to concurrent terms of six months' imprisonment followed by two years' probation; he was fined a total of $18,000—$2,000 on each count.

Petitioner appealed his convictions to the Court of Appeals for the Third Circuit claiming, *inter alia*, that he could not

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[5] Niederberger was sentenced to six months' imprisonment followed by a five-year period of probation, and he was fined $5,000. His convictions were affirmed by the Court of Appeals. *United States* v. *Niederberger*, 580 F. 2d 63 (CA3 1978).

[6] The jury was instructed that in order to render a guilty verdict on the § 7214 (a) counts it must determine (1) that Niederberger knowingly "received a fee, compensation or reward except as prescribed by law . . . for the performance . . . of any duty" and (2) that petitioner "willfully aided and abetted [him]." App. 53a–54a, 57a.

be convicted of aiding and abetting a principal, Niederberger, when that principal had been acquitted of the charged offense. By a divided vote, the Court of Appeals, sitting en banc, rejected that contention. 610 F. 2d 1076 (1979). It concluded that "the outcome of Niederberger's prosecution has no effect on [petitioner's] conviction." *Id.*, at 1078.

Because the question presented is one of importance to the administration of criminal justice on which the Courts of Appeals are in conflict, we granted certiorari.[7] 444 U. S. 1011. We affirm.

II

Petitioner makes two main arguments: first, that Congress in enacting 18 U. S. C. § 2 did not intend to authorize prosecution of an aider and abettor after the principal has been acquitted of the offense charged; second, that, even if § 2 permits such a prosecution, the Government should be barred from relitigating the issue of whether Niederberger accepted unlawful compensation in connection with the Pompano Beach, Miami, and Absecon vacations.[8] The first contention relies largely on the common law as it prevailed before the enactment of 18 U. S. C. § 2. The second rests on the contemporary doctrine of nonmutual collateral estoppel.

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[7] The Courts of Appeals for the Fifth Circuit, the Ninth Circuit, and the District of Columbia Circuit have reached the same conclusion as the Third Circuit. See *United States* v. *Musgrave*, 483 F. 2d 327, 331–332 (CA5 1973); *United States* v. *Azadian*, 436 F. 2d 81 (CA9 1971); *Perkins* v. *United States*, 315 F. 2d 120, 122 (CA9 1963); *Gray* v. *United States*, 104 U. S. App. D. C. 153, 260 F. 2d 483 (1958). The Court of Appeals for the Fourth Circuit has taken the contrary view that "where the only potential principal has been acquitted, no crime has been established and the conviction of an aider and abettor cannot be sustained." *United States* v. *Shuford*, 454 F. 2d 772, 779 (1971). Accord, *United States* v. *Prince*, 430 F. 2d 1324 (CA4 1970). See also n. 11, *infra*.

[8] Petitioner also challenges the instructions to the jury on criminal intent. We agree with the Court of Appeals that the instructions were correct.

A

At common law, the subject of principals and accessories was riddled with "intricate" distinctions. 2 J. Stephen, A History of the Criminal Law of England 231 (1883). In felony cases, parties to a crime were divided into four distinct categories: (1) principals in the first degree who actually perpetrated the offense; (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission; (3) accessories before the fact who aided or abetted the crime, but were not present at its commission; and (4) accessories after the fact who rendered assistance after the crime was complete. See W. LaFave & A. Scott, Criminal Law § 63 (1972); 4 W. Blackstone, Commentaries *33; Perkins, Parties to Crime, 89 U. Pa. L. Rev. 581 (1941). By contrast, misdemeanor cases "d[id] not admit of accessaries either before or after the fact," *United States* v. *Hartwell*, 26 F. Cas. 196, 199 (No. 15,318) (CC Mass. 1869); instead, all parties to a misdemeanor, whatever their roles, were principals. *United States* v. *Dotterweich*, 320 U. S. 277, 281 (1943); 1 C. Torcia, Wharton's Criminal Law § 33 (14th ed. 1978).

Because at early common law all parties to a felony received the death penalty, certain procedural rules developed tending to shield accessories from punishment. See LaFave & Scott, *supra*, at 499. Among them was one of special relevance to this case: the rule that an accessory could not be convicted without the prior conviction of the principal offender. See 1 M. Hale, Pleas of the Crown *623–*624. Under this rule, the principal's flight, death, or acquittal barred prosecution of the accessory. And if the principal were pardoned or his conviction reversed on appeal, the accessory's conviction could not stand. In every way, "an accessory follow[ed], like a shadow, his principal." 1 J. Bishop, Criminal Law § 666 (8th ed. 1892).

This procedural bar applied only to the prosecution of ac-

cessories in felony cases. In misdemeanor cases, where all participants were deemed principals, a prior acquittal of the actual perpetrator did not prevent the subsequent conviction of a person who rendered assistance. *Queen* v. *Humphreys and Turner*, [1965] 3 All E. R. 689; *Queen* v. *Burton*, 13 Cox C. C. 71, 75 (Crim. App. 1875). And in felony cases a principal in the second degree could be convicted notwithstanding the prior acquittal of the first-degree principal. *King* v. *Taylor and Shaw*, 168 Eng. Rep. 283 (1785); *Queen* v. *Wallis*, 1 Salk. 334, 91 Eng. Rep. 294 (K. B. 1703); *Brown* v. *State*, 28 Ga. 199 (1859); *State* v. *Whitt*, 113 N. C. 716, 18 S. E. 715 (1893). Not surprisingly, considerable effort was expended in defining the categories—in determining, for instance, when a person was "constructively present" so as to be a second-degree principal. 4 Blackstone, *supra*, at *34. In the process, justice all too frequently was defeated.

To overcome these judge-made rules, statutes were enacted in England and in the United States. In 1848 the Parliament enacted a statute providing that an accessory before the fact could be "indicted, tried, convicted, and punished in all respects *like the Principal*." 11 & 12 Vic. ch. 46, § 1 (emphasis added). As interpreted, the statute permitted an accessory to be convicted "although the principal be acquitted." *Queen* v. *Hughes*, Bell 242, 248, 169 Eng. Rep. 1245, 1248 (1860). Several state legislatures followed suit.[9] In 1899,

[9] By 1909, when § 2 was enacted, 13 States had enacted legislation providing that the acquittal of the actual perpetrator was not a bar to the conviction of one charged with giving him aid. See Cal. Stat., ch. 99, §§ 11, 12 (1850) (see *People* v. *Bearss*, 10 Cal. 68, 70 (1858)); Del. Rev. Stat., ch. 133, § 1 (1893); Iowa Rev. Code Ann. § 4314 (1885) (see *State* v. *Lee*, 91 Iowa 499, 501–502, 60 N. W. 119, 120 (1894)); Kan. Gen. Stat. § 5180 (1889) (see *State* v. *Bogue*, 52 Kan. 79, 86–87, 34 P. 410, 412 (1893)); Ky. Stat. § 1128 (1903) (see *Commonwealth* v. *Hicks*, 118 Ky. 637, 642, 82 S. W. 265, 266 (1904)); Miss. Code § 1026 (1906) (see *Fleming* v. *State*, 142 Miss. 872, 880–881, 108 So. 143, 144–145 (1926)); Mont. Penal Code Ann. § 1854 (1895); N. Y. Penal Code § 29 (1895)

Congress joined this growing reform movement with the enactment of a general penal code for Alaska which abrogated the common-law distinctions and provided that "all persons

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(see *People* v. *Kief*, 126 N. Y. 661, 663–664, 27 N. E. 556, 557 (1891)); N. D. Rev. Code Crim. Proc. § 8060 (1895); Okla. Stat. § 5523 (1890); S. D. Stat. Ann. § 8520 (1899); Utah Comp. Laws § 4752 (1907); Wash. Code of Proc. § 1189 (1891) (see *State* v. *Gifford*, 19 Wash. 464, 467–468, 53 P. 709, 710 (1898)).

Since then, at least 21 other States have enacted legislation with that effect. See 1977 Ala. Act No. 607, § 425; Ariz. Rev. Stat. Ann. § 13–304–1 (1978); Ark. Stat. Ann. § 41–304 (1977); Colo. Rev. Stat. § 18–1–605 (1973) (see *Roberts* v. *People*, 103 Colo. 250, 87 P. 2d 251 (1938)); Conn. Gen. Stat. § 53a–9 (1979); Fla. Stat. § 777.011 (1979) (see *Butts* v. *State*, 286 So. 2d 28 (1973)); Ga. Code § 26–802 (1978); Ill. Rev. Stat., ch. 38, § 5–3 (1979); Ind. Code § 35–41–2–4 (Supp. 1978); La. Rev. Stat. Ann. § 14.24 (West 1974) (see *State* v. *McAllister*, 366 So. 2d 1340 (1978)); Me. Rev. Stat. Ann., Tit. 17–A, § 57 (1979); Mich. Comp. Laws § 767.39 (1970) (*People* v. *Smith*, 271 Mich. 553, 260 N. W. 911 (1935)); Mo. Rev. Stat. § 562.046 (1978); Neb. Rev. Stat. § 28–206 (Supp. 1978) (*State* v. *Rice*, 188 Neb. 728, 199 N. W. 2d 480 (1972)); N. H. Rev. Stat. Ann. § 626.8 (1974); N. J. Stat. Ann. § 2C: 2–6 (West Spec. Pamph. 1979); N. M. Stat. Ann. § 30–1–13 (1978); Pa. Cons. Stat., Tit. 18, § 306 (Supp. 1979); S. C. Code § 16–1–50 (1976) (*State* v. *Massey*, 229 S. E. 2d 332 (1976)); Tex. Penal Code Ann. § 7.03 (Vernon 1974); Wis. Stat. § 939.05 (1977).

Eleven other States have enacted statutes that modify the common-law rule; these statutes have not been authoritatively construed on whether an accessory can be prosecuted after his principal's acquittal. See Haw. Rev. Stat. § 702–225 (1976); Idaho Code § 19–1431 (1979); Mass. Gen. Laws Ann., ch. 274, § 3 (West 1970); Minn. Stat. § 609.05 (1978); Nev. Rev. Stat. § 195.040 (1979); Ohio Rev. Code Ann. § 2923.03 (1979); Ore. Rev. Stat. § 161.160 (1979); Vt. Stat. Ann., Tit. 13, § 3 (1974); Va. Code § 18.2–21 (1975); W. Va. Code § 61–11–7 (1977); Wyo. Stat. § 6–1–114 (1977).

Only four States—Maryland, North Carolina, Rhode Island, and Tennessee—clearly retain the common-law bar. See *State* v. *Ward*, 284 Md. 189, 396 A. 2d 1041 (1978); *State* v. *Jones*, 101 N. C. 719, 8 S. E. 147 (1888) (interpreting N. C. Gen. Stat. § 14–5 (1969)); R. I. Gen. Laws § 11–1–3 (1970); *Pierce* v. *State*, 130 Tenn. 24, 168 S. W. 851 (1914).

The Model Penal Code provides that an accomplice may be convicted "though the person claimed to have committed the offense . . . has been

concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such." Act of Mar. 3, 1899, § 186, 30 Stat. 1282. In 1901, Congress enacted a similar provision for the District of Columbia.[10]

The enactment of 18 U. S. C. § 2 in 1909 was part and parcel of this same reform movement. The language of the statute, as enacted, unmistakably demonstrates the point:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, *is a principal.*" Act of Mar. 4, 1909, § 332, 35 Stat. 1152 (emphasis added).[11]

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acquitted." § 2.06 (7) (Tent. Draft No. 3, 1955), and see comments 38–39 (Tent. Draft No. 1, 1953).

[10] The provision is still in effect; it provides that all persons "aiding or abetting the principal offender, shall be charged as principals and not as accessories, the *intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes. . . .*" Act of Mar. 3, 1901, § 908, 31 Stat. 1337; D. C. Code § 22–105 (1973) (emphasis added).

[11] In 1951, the words "is a principal" were altered to read "is punishable as a principal." That change was designed to eliminate all doubt that in the case of offenses whose prohibition is directed at members of specified classes (*e. g.*, federal employees) a person who is not himself a member of that class may nonetheless be punished as a principal if he induces a person in that class to violate the prohibition. See S. Rep. No. 1020, 82d Cong., 1st Sess., 7–8 (1951). The change was fully consistent with congressional intent to treat accessories before the fact as principals and to abolish the common-law procedural bar. Indeed, by the time of the 1951 re-enactment, the Circuit Courts that had addressed the question had concluded that § 2 authorizes conviction of an aider and abettor notwithstanding the prior acquittal of the perpetrator of the offense. See *United States* v. *Klass*, 166 F. 2d 373, 380 (CA3 1948); *Von Patzoll* v. *United States*, 163 F. 2d 216, 219 (CA10 1947); *Kelly* v. *United States*, 258 F. 392, 402 (CA6 1919); *Rooney* v. *United States*, 203 F. 928,

The statute "abolishe[d] the distinction between principals and accessories and [made] them all principals." *Hammer* v. *United States*, 271 U. S. 620, 628 (1926). Read against its common-law background, the provision evinces a clear intent to permit the conviction of accessories to federal criminal offenses despite the prior acquittal of the actual perpetrator of the offense. It gives general effect to what had always been the rule for second-degree principals and for all misdemeanants.

The legislative history of § 2 confirms this understanding. The provision was recommended by the Commission to Revise and Codify the Criminal and Penal Laws of the United States as "[i]n accordance with the policy of recent legislation" by which "those whose relations to a crime would be that of accessories before the fact according to the common law are made principals." 1 Final Report of the Commission to Revise and Codify the Laws of the United States 118–119 (1906). The Commission's recommendation was adopted without change. The House and Senate Committee Reports, in identical language, stated its intended effect:

> "The committee has deemed it wise to make those who are accessories before the fact at common law principal offenders, thereby permitting their indictment and conviction for a substantive offense.
>
> "At common law an accessory can not be tried without his consent before the conviction or outlawry of the principal except where the principal and accessory are tried together; if the principal could not be found or if he had been indicted and refused to plead, had been pardoned or died before conviction, the accessory could not be tried at all. This change of the existing law renders these obstacles to justice impossible." S. Rep. No. 10, 60th

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931–932 (CA9 1913). Congress manifested no intent to disturb this interpretation. See *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978).

Cong., 1st Sess., pt. 1, p. 13 (1908); H. R. Rep. No. 2, 60th Cong., 1st Sess., pt. 1, p. 13 (1908).[12]

And on the floor of the House of Representatives, Representative Moon, the Chairman of the Joint Select Committee, put the point simply: "We . . . have abolished the existing arbitrary distinction between felonies and misdemeanors." 42 Cong. Rec. 585 (1908).

This history plainly rebuts petitioner's contention that § 2 was not intended to authorize conviction of an aider and abettor after the principal had been acquitted of the offense charged.[13] With the enactment of that section, all participants in conduct violating a federal criminal statute are "principals." As such, they are punishable for their criminal conduct; the fate of other participants is irrelevant.[14]

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[12] Petitioner emphasizes the fact that the Committee Report fails to mention the common-law rule that the prior acquittal of a principal barred conviction of an accessory, and argues accordingly that Congress did not view that rule as an "obstacle to justice." The Court of Appeals correctly rejected this argument, being unwilling to "apply the canon of statutory interpretation . . . *expressio unius, exclusio alterius* . . . to the language employed in a *committee report*." 610 F. 2d 1076, 1084 (CA3 1979) (emphasis added). We agree. Petitioner's argument would permit an omission in the legislative history to nullify the plain meaning of a statute. The language of § 2 abolishes the common-law categories and treats all parties as principals. It is not necessary for Congress in its committee reports to identify all of the "weeds" which are being excised from the garden.

[13] It bears mention that even prior to 1909 petitioner would not have prevailed in his attempt to bar prosecution on the § 7214 (a) (2) counts. As the Government notes, the version of 26 U. S. C. § 7214 then in effect defined the offense to be a misdemeanor. See Rev. Stat. § 3169 (1878). Hence, the prior acquittal of his principal would not have barred petitioner's prosecution. And because petitioner accompanied Niederberger on four of five trips and therefore was "present" at the scene of the crime, see Tr. 1018–1020, 1024–1027, 1034–1036, 1096, he could have been convicted at common law for those crimes even if the offense had been designated a felony.

[14] Nothing in *Shuttlesworth* v. *Birmingham*, 373 U. S. 262 (1963), relied on by petitioner, is to the contrary. There, petitioner had been con-

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The doctrine of nonmutual collateral estoppel was unknown to the common law and to the Congress when it enacted § 2 in 1909.[15] It emerged in a civil case in 1942, *Bernhard* v. *Bank of America Nat. Trust & Savings Assn.*, 19 Cal. 2d 807, 122 P. 2d 892. This Court first applied the doctrine in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971). There, we held that a determination of patent invalidity in a prior infringement action was entitled to preclusive effect against the patentee in subsequent litigation against a different defendant. Just this past Term we again applied the doctrine—this time "offensively"—to hold that a defendant who had had a "full and fair" opportunity to litigate issues of fact in a civil proceeding initiated by the Securities and Exchange Commission could be estopped from relitigating those issues in a subsequent action brought by a private plaintiff. *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322 (1979). In both cases, application of nonmutual estoppel promoted judicial economy and conserved private resources without unfairness to the litigant against whom estoppel was invoked.

Here, petitioner urges us to apply nonmutual estoppel against the Government; specifically he argues that the Gov-

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victed of aiding and abetting others to violate a city trespass ordinance which subsequently was declared constitutionally invalid. See *Gober* v. *Birmingham*, 373 U. S. 374 (1963). Shuttlesworth's case merely applied the rule that "there can be no conviction for aiding and abetting someone to do an innocent act." 373 U. S., at 265. Here, by contrast, the Government proved in petitioner's case that Niederberger had violated § 7214 (a)(2) in connection with each of the five trips. See n. 6, *supra*.

[15] In 1912, in *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 127, this Court stated that it was "a principle of general elementary law that the estoppel of a judgment must be mutual." See also *Stone* v. *Farmers Bank of Kentucky*, 174 U. S. 409 (1899); *Keokuk & Western R. Co.* v. *Missouri*, 152 U. S. 301, 317 (1894); *Litchfield* v. *Goodnow*, 123 U. S. 549, 552 (1887).

ernment should be barred from relitigating Niederberger's guilt under § 7214 (a)(2) in connection with the vacation trips to Pompano Beach, Miami, and Absecon. That issue, he notes, was an element of his offense which was determined adversely to the Government at Niederberger's trial.[16]

This, however, is a criminal case, presenting considerations different from those in *Blonder-Tongue* or *Parklane Hosiery*. First, in a criminal case, the Government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. Several aspects of our criminal law make this so: the prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt, cf. Fed. Rule Civ. Proc. 50; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence, cf. Fed. Rule Civ. Proc. 59; and it cannot secure appellate review where a defendant has been acquitted. See *United States* v. *Ball*, 163 U. S. 662, 671 (1896).

The absence of these remedial procedures in criminal cases permits juries to acquit out of compassion or compromise or because of " 'their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.' " *Dunn* v. *United States*, 284 U. S. 390, 393 (1932), quoting *Steckler* v. *United States*, 7 F. 2d 59, 60 (CA2 1925). See generally H. Kalven & H. Zeisel, The American Jury

[16] Petitioner does not contend that the Constitution prevents the Government from prosecuting him on the three § 7214 (a)(2) counts as to which Niederberger was acquitted. Nothing in the Double Jeopardy Clause or the Due Process Clause forecloses putting petitioner on trial as an aider and abettor simply because another jury has determined that his principal was not guilty of the offenses charged. Cf. *Ashe* v. *Swenson*, 397 U. S. 436 (1970).

193–347 (ed. 1976).[17] It is of course true that verdicts induced by passion and prejudice are not unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the Government has no similar avenue to correct errors. Under contemporary principles of collateral estoppel, this factor strongly militates against giving an acquittal preclusive effect. See Restatement (Second) of Judgments § 68.1 (Tent. Draft No. 3, 1976) (denying preclusive effect to an unreviewable judgment).[18]

The application of nonmutual estoppel in criminal cases is also complicated by the existence of rules of evidence and exclusion unique to our criminal law. It is frequently true in criminal cases that evidence inadmissible against one defendant is admissible against another. The exclusionary rule, for example, may bar the Government from introducing evidence against one defendant because that evidence was obtained in violation of his constitutional rights. And the suppression of that evidence may result in an acquittal.

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[17] Niederberger's case demonstrates the point. As to the Absecon and Miami vacations, the jury convicted Niederberger of receiving something of value "because of any official act performed . . . by him," 18 U. S. C. § 201 (g), but acquitted him of receiving "any fee, compensation, or reward . . . for the performance of any duty," 26 U. S. C. § 7214 (a)(2). No explanation has been offered for these seemingly irreconcilable determinations. This inconsistency is reason, in itself, for not giving preclusive effect to the acquittals on the Absecon and Miami counts. See Restatement (Second) of Judgments § 88 (4) (Tent. Draft No. 3, 1976). See also 610 F. 2d, at 1112 (Gibbons, J., concurring in part and dissenting in part); *Harary* v. *Blumenthal*, 555 F. 2d 1113, 1116–1117 (CA2 1977).

[18] This is not to suggest that the availability of appellate review is always an essential predicate of estoppel. See *Johnson Co.* v. *Wharton*, 152 U. S. 252 (1894); see generally 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.416 [5] (2d ed. 1974). The estoppel doctrine, however, is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct. In the absence of appellate review, or of similar procedures, such confidence is often unwarranted.

The same evidence, however, may be admissible against other parties to the crime "whose rights were [not] violated." *Alderman* v. *United States*, 394 U. S. 165, 171–172 (1969). Accord, *Rakas* v. *Illinois*, 439 U. S. 128, 134 (1978). In such circumstances, where evidentiary rules prevent the Government from presenting all its proof in the first case, application of nonmutual estoppel would be plainly unwarranted.[19]

It is argued that this concern could be met on a case-by-case basis by conducting a pretrial hearing to determine whether any such evidentiary ruling had deprived the Government of an opportunity to present its case fully the first time around. That process, however, could prove protracted and burdensome. Under such a scheme, the Government presumably would be entitled to seek review of any adverse evidentiary ruling rendered in the first proceeding and of any aspect of the jury charge in that case that worked to its detriment. Nothing short of that would insure that its opportunity to litigate had been "full and fair." If so, the "pretrial hearing" would fast become a substitute for appellate review, and the very purpose of litigation economy that estoppel is designed to promote would be frustrated.

Finally, this case involves an ingredient not present in either *Blonder-Tongue* or *Parklane Hosiery*: the important federal interest in the enforcement of the criminal law. *Blonder-Tongue* and *Parklane Hosiery* were disputes over private rights between private litigants. In such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation.

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[19] Indeed, as the Court of Appeals observed, to give the first case preclusive effect would undermine the *Alderman* rule by affording a defendant whose rights were not violated the benefits of suppression. See 610 F. 2d, at 1094, n. 51.

That is not so here. The Court of Appeals opinion put the point well:

> "[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interests of the courts, nor the public." 610 F. 2d, at 1093.

In short, this criminal case involves "competing policy considerations" that outweigh the economy concerns that undergird the estoppel doctrine. See Restatement (Second) of Judgments § 68.1 (e) and comments thereto (Tent. Draft No. 3, 1976); cf. *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948).

III

In denying preclusive effect to Niederberger's acquittal, we do not deviate from the sound teaching that "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U. S. 11, 14 (1954). This case does no more than manifest the simple, if discomforting, reality that "different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." *Roth* v. *United States*, 354 U. S. 476, 492, n. 30 (1957). While symmetry of results may be intellectually satisfying, it is not required. See *Hamling* v. *United States*, 418 U. S. 87, 101 (1974).

Here, petitioner received a fair trial at which the Government bore the burden of proving beyond reasonable doubt that Niederberger violated 26 U. S. C. § 7214 (a)(2) and that petitioner aided and abetted him in that venture. He was entitled to no less—and to no more.

The judgment of the Court of Appeals is

Affirmed.

Syllabus

LEWIS, COMPTROLLER OF FLORIDA *v.* BT INVESTMENT MANAGERS, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

No. 79–45. Argued January 15, 1980—Decided June 9, 1980

A Florida statute (§ 659.141 (1)) prohibits out-of-state banks, bank holding companies, and trust companies from owning or controlling a business within the State that sells investment advisory services. Another statute (§ 660.10) prohibits all corporations except state-chartered banks and trust companies and national banks located in Florida from performing certain trust and fiduciary functions. Appellee out-of-state bank holding company's proposal to operate appellee investment management subsidiary in Florida was rejected by the Board of Governors of the Federal Reserve System on the ground that it was prohibited by § 659.141 (1). Appellees then brought suit in Federal District Court for declaratory and injunctive relief, alleging, *inter alia*, that § 659.141 (1) violates the Commerce Clause and that the joint operation of that section with § 660.10 constitutes a similar violation since but for the existence of such statutes authority would be sought to establish a subsidiary trust company in Florida. The District Court held that the statutes violate the Commerce Clause, because in combination they discriminate against out-of-state bank holding companies and are "parochial legislation" that "must be deemed per se unconstitutional." The court also held that the federal Bank Holding Company Act of 1956 does not foster or permit the types of discrimination against out-of-state bank holding companies reflected in the Florida statutes. The court granted declaratory relief against both statutes but enjoined only the enforcement of § 659.141 (1).

Held:

1. Section 659.141 (1) directly burdens interstate commerce in a manner that contravenes the Commerce Clause's implicit limitation on state power. Pp. 37–49.

(a) While banking and related financial activities are of profound local concern, it does not follow that these same activities lack important interstate attributes that establish Congress' power to regulate commerce and that also support constitutional limitations on the powers of the States. Such limitations clearly apply in this case. Pp. 38–39.

(b) The District Court properly concluded that § 659.141 (1) is "parochial" in the sense that it overtly prevents foreign enterprises from competing in local markets. Under that section, discrimination against affected business organizations is *not* evenhanded because only banks, bank holding companies, and trust companies with principal operations *outside* Florida are prohibited from operating investment subsidiaries or giving investment advice within the State. It follows that § 659.141 (1) discriminates *among* affected business entities according to the extent of their contacts with the local economy. *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, distinguished. And the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns, such as discouraging economic concentration or protecting the citizenry against fraud, or by an asserted interest in promoting local control over financial institutions. Pp. 39–44.

(c) Neither § 3 (d) of the Bank Holding Company Act—which prohibits bank holding companies from acquiring banking subsidiaries in other States without local authorization—nor § 7 of that Act—which reserves to the States a general power to enact regulations applicable to bank holding companies—authorizes a State to prohibit out-of-state holding companies from acquiring local investment subsidiaries. The only authority § 3 (d) grants to the States is the authority to *permit* expansion of banking across state lines where it would be otherwise federally prohibited. Moreover, the Act's structure reveals that § 3 (d) applies only to holding company acquisitions of banks. Section 7 was intended to preserve existing state regulations of bank holding companies and to define the extent of the Act's pre-emptive effect on state law, and there is nothing in § 7's language or legislative history to indicate that it was also intended to extend to the States new powers to regulate banking that they would not have possessed absent federal legislation. Section 7 applies only to state legislation that operates within the boundaries marked by the Commerce Clause. Pp. 44–49.

2. Since the constitutionality of § 660.10 was neither fully placed in issue nor fully determined by the District Court's decision, the validity of that section's limitation on the types of corporations that may perform trust responsibilities is not properly before this Court at this stage of the proceedings; hence, the District Court's judgment with respect to § 660.10 is vacated and the case is remanded for further proceedings. Moreover, the amendment, in the interim, of § 3 (d) of the Bank Holding Company Act so as apparently to prohibit appellee bank holding company from establishing a Florida trust subsidiary raises new jurisdic-

tional and substantive questions that should be addressed in the first instance by the District Court. Pp. 50–53.

461 F. Supp. 1187, affirmed in part, vacated in part, and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Erwin N. Griswold argued the cause for appellant. On the brief were *Eugene J. Cella* and *Franklyn J. Wollett.*

John L. Warden argued the cause for appellees. On the brief were *John E. Mathews, Jr., Stephen E. Day,* and *Vincent J. Rio III.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the constitutionality of two Florida statutes regulating the conduct of investment advisory and trust services within that State. A three-judge United States District Court, convened pursuant to 28 U. S. C. § 2281 (1970 ed.),[1] held that the statutes violate the Commerce Clause, U. S. Const., Art. 1, § 8, cl. 3, because in combination they discriminate against bank holding companies that operate principally outside Florida. It also held that such discrimination is not authorized by federal legislation regulating the interstate operations of bank holding companies. The case was brought here on direct appeal, see 28 U. S. C. § 1253, and we noted probable jurisdiction to resolve the substantial constitutional and statutory issues presented. 444 U. S. 822 (1979).

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*Briefs of *amici curiae* urging reversal were filed by *Erwin N. Griswold* and *James F. Bell* for the Conference of State Bank Supervisors; and by *J. Thomas Cardwell* and *Michael P. McMahon* for the Florida Bankers Association.

John L. Warden and *Robert D. Owen* filed a brief for the New York Clearing House Association as *amicus curiae* urging affirmance.

[1] This action was filed on October 24, 1973, and is therefore unaffected by the subsequent repeal of 28 U. S. C. § 2281, which by its terms was made inapplicable to any action commenced on or before August 12, 1976. See Pub. L. 94–381, § 7, 90 Stat. 1120.

I

Appellee Bankers Trust New York Corporation (Bankers Trust) is a corporation organized under the laws of the State of New York. It maintains its principal place of business in that State. It is a bank holding company within the meaning of § 2 (a) of the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U. S. C. § 1841 (a) (1976 ed. and Supp. II) (Act). Accordingly, it is subject to federal restrictions on the kinds of subsidiaries it may own or control. Upon authorization from the Board of Governors of the Federal Reserve System, however, it is permitted to own or control shares of any company the business of which is "so closely related to banking or managing or controlling banks as to be a proper incident thereto." § 4 (c)(8) of the Act, 12 U. S. C. § 1843 (c)(8). By regulation, the Board has designated both the provision of investment or financial advice and the performance of certain trust functions as "closely related" business within the meaning of this statute. See 12 CFR §§ 225.4 (a)(4) and (5) (1979).

In 1972, the management of Bankers Trust decided to seek the Board's approval for an investment management subsidiary to operate in Florida. On October 3 of that year, Bankers Trust filed a formal proposal for such a subsidiary, which it planned to operate from offices in Palm Beach. Appellee BT Investment Managers, Inc. (BTIM), was Bankers Trust's intended vehicle for entry into the Florida market. It was incorporated under the laws of the State of Delaware as a wholly owned subsidiary on November 24, 1972. Three days later it qualified to do business in Florida. The application to the Board proposed that BTIM would provide "portfolio investment advice," as well as "general economic information and advice, general economic statistical forecasting services and industry studies" to persons other than banks. See Complaint ¶ 7, App. 9–10, and appellant's Answer ¶ 7, App. 19.

When Bankers Trust filed its application with the Board, certain Florida statutes restricted the ability of out-of-state bank holding companies to compete in the State's financial market. At that time Fla. Stat. § 659.141 (1), added by 1972 Fla. Laws, ch. 72–96, § 1, and effective March 28, 1972, prohibited Bankers Trust from owning or controlling a bank or trust company located within the State; the same statute also prohibited it from owning businesses furnishing investment advisory services to local banks or trust companies. In addition, Fla. Stat. § 660.10 prohibited any corporation, other than a state-chartered bank and trust company or a national banking association located in Florida, from performing certain trust and fiduciary functions. Neither statute, however, directly prohibited an out-of-state bank holding company from owning or controlling a business furnishing investment advisory services to the general public. Thus, at the time Bankers Trust filed its application with the Board, it appeared that ownership of BTIM would not violate Florida law, although BTIM would be restricted in the types of financial services it could perform and the customers it could serve.

The reaction of the Florida financial community to Bankers Trust's proposed investment subsidiary was decidedly negative. The State Comptroller, the Florida Bankers Association, and the Palm Beach County Bankers Association, Inc., all filed comments with the Board objecting to the Bankers Trust proposal. More importantly for present purposes, the state legislature was persuaded to take action. On November 30, 1972, shortly after BTIM had qualified to do business in the State, a special session of the legislature amended Fla. Stat. § 659.141 (1). That statute, which had been on the books only since March 28 of that year, was expanded to prohibit an out-of-state bank holding company from owning or controlling a business within the State that sells investment advisory services to any customer, rather than just to "trust companies or banks" in Florida, as the statute theretofore had

read.[2] This amendment took effect, without the Governor's approval, on December 21, 1972. There is evidence that the amendment was a direct response to Bankers Trust's pending application, and that it had the strong backing of the local financial community.

On April 26, 1973, the Board rejected Bankers Trust's proposal on the ground that it would conflict with state law. *Bankers Trust New York Corp.*, 59 Fed. Res. Bull. 364. The Board observed that the proposal contemplated *de novo* entry into the Florida investment management market rather than acquisition of an existing concern, and it noted that *de novo* entry ordinarily has a desirable procompetitive impact. Absent evidence of a contrary effect in this case, the Board intimated that it would have been favorably inclined toward the proposal. But it found that the December amendment to Fla. Stat. § 659.141 (1) "was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies." 59 Fed. Res. Bull., at 365. In view of its obligation to respect the dictates of state law, the Board found itself constrained to reject the proposal. See 12 U. S. C. § 1846; *Whitney Nat. Bank* v. *Bank of New Orleans*, 379 U. S. 411, 424–425 (1965).

Within six months of the Board's decision, the two appellees

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[2] See 1972 Fla. Laws, ch. 72–726, §§ 1–7. As so amended, § 659.141 (1) reads in pertinent part:

"[N]o bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, [or] retain, *or own*, directly or indirectly, all, or substantially all the assets of, or control over, any *bank or* trust company having a place of business in this state where the *business of banking or* trust business or functions are conducted, or acquire, [or] retain, *or own* all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services [to trust companies or banks] in this state."

The italicized words were added, and the bracketed words were deleted, by the December 1972 amendment.

filed this action seeking declaratory and injunctive relief.[3] Count I of their complaint alleged that Fla. Stat. § 659.141 (1) "is not designed to promote lawful regulatory objectives, but is intended to shelter those organizations presently conducting an investment advisory business in Florida from competition by [BTIM]." Complaint ¶ 11, App. 11. The complaint alleged violations of the due process and equal protection guarantees of the Fourteenth Amendment, as well as violation of the Commerce Clause. Count II alleged similar constitutional defects as the result of the joint operation of §§ 659.141 (1) and 660.10. Appellees alleged that "[b]ut for the existence of the challenged statutes," Bankers Trust would seek authority from the Board to establish "a subsidiary trust company having a national bank charter or a Florida state charter" that would engage exclusively in one or more of the functions regulated by § 660.10. Complaint ¶ 21, App. 14–15. A three-judge court was convened pursuant to 28 U. S. C. § 2281 (1970 ed.), and the case was submitted for summary judgment on a stipulated set of facts.

The District Court, by a divided vote, initially dismissed the complaint without prejudice on the ground that it should abstain from decision under either *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941), or *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943). *BT Investment Managers, Inc.* v. *Dickinson*, 379 F. Supp. 792 (ND Fla. 1974). The United States Court of Appeals for the Fifth Circuit, however, reversed and remanded for consideration of the merits. 559 F. 2d 950 (1977).

On remand, the District Court held that the challenged portions of the two statutes violate the Commerce Clause. 461 F. Supp. 1187 (1978). Without reaching appellees' due process and equal protection arguments, it found that the

[3] Bankers Trust in November 1973 petitioned the United States Court of Appeals for the Second Circuit for review of the Board's order denying the proposal. That petition has been withdrawn, with leave to reinstate, pending the outcome of this suit.

statutes under attack discriminate against interstate commerce. The court reasoned that § 659.141 (1) "erects an insuperable barrier to the entry of foreign-based bank holding companies, through their subsidiaries, into the Florida investment advisory market," and that § 660.10 "similarly cordons off Florida trust companies from competition by out-of-state concerns." 461 F. Supp., at 1196. It ruled that the statutes are "parochial legislation" that "must be deemed per se unconstitutional." *Ibid.* Moreover, it held that the legislative purposes proffered by appellant, including a purported desire to curb anticompetitive abuses arising from agglomeration of financial power, failed to justify the discriminatory impact of the statutes.

Finally, the District Court held that the federal Bank Holding Company Act does not foster or permit the types of discrimination against out-of-state bank holding companies reflected in the Florida statutes. The court eschewed the argument that either § 3 (d) of the Act, 12 U. S. C. § 1842 (d), or § 7 of the Act, 12 U. S. C. § 1846, authorized the statutes in question. It recognized that § 3 (d) prohibits bank holding companies from acquiring banking subsidiaries in other States without local authorization. But it rejected the contention that this prohibition implicitly extends as well to related businesses, such as the providing of investment advice.

The court issued an order granting declaratory relief against both statutes but enjoining the enforcement of only § 659.141 (1) against appellees.[4]

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[4] Initially the court declared the entire first sentence of § 659.141 (1) unconstitutional. App. to Juris. Statement A1. It amended that order, however, to limit its declaration to that portion of the sentence dealing with investment advisory and trust services. See *id.*, at D1–D2. The court rendered no decision on the constitutionality of those portions of the statute that govern acquisition of Florida banks by out-of-state banks, bank holding companies, or trust companies. The court refused to grant injunctive relief against § 660.10 because appellees had yet to attempt establishment of a trust company in Florida; the court accordingly determined that

II

This appeal presents two distinct but related questions with respect to the validity of the challenged Florida statutes.[5] The first is whether the statutes, viewed independently of federal legislation regulating the banking industry, burden interstate commerce in a manner contrary to the Commerce Clause. The second is whether Congress, by its own legislation in this area, has created an area in which the States may regulate free from Commerce Clause restraints. Since there is no contention that federal legislation pre-empts the state laws in question, federal law becomes important only if it appears that the Florida statutes cannot survive without federal authorization. Thus, the second question becomes pertinent only if we reach an affirmative answer to the first.

These questions arise against a backdrop of familiar principles. The Commerce Clause grants to Congress the power "[t]o regulate Commerce . . . among the several States." U. S. Const., Art. 1, § 8, cl. 3. Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade. See, *e. g.*, *Hughes* v. *Oklahoma*, 441 U. S. 322, 326 (1979); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 623 (1978); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 534–538 (1949); *Cooley* v. *Board of*

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injunctive relief against that statute would be premature. 461 F. Supp. 1187, 1201 (ND Fla. 1978).

[5] Because the District Court granted injunctive relief with respect to § 659.141 (1), we have jurisdiction, under 28 U. S. C. § 1253, over the appeal. See *White* v. *Regester*, 412 U. S. 755, 761 (1973). See, however, Part IV, *infra*.

While this case was pending in the District Court, the Florida Division of Securities, acting pursuant to a "grandfather" clause, Fla. Stat. § 659.141 (3), authorized Bankers Trust to conduct investment advisory services from a single Florida office. This authorization does not moot the controversy, because the District Court's injunction leaves Bankers Trust free to establish additional offices that § 659.141 (1) would otherwise prohibit.

Wardens, 12 How. 299 (1852). This limitation upon state power, of course, is by no means absolute. In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of "legitimate local concern," even though interstate commerce may be affected. See, *e. g.*, *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 440 (1978); *Great A&P Tea Co.* v. *Cottrell*, 424 U. S. 366, 371 (1976). Where such legitimate local interests are implicated, defining the appropriate scope for state regulation is often a matter of "delicate adjustment." *Ibid.*, quoting *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 553 (Black, J., dissenting). Yet even in regulating to protect local interests, the States generally must act in a manner consistent with the "ultimate . . . principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 527 (1935). However important the state interest at hand, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Philadelphia* v. *New Jersey*, 437 U. S., at 626–627.

Over the years, the Court has used a variety of formulations for the Commerce Clause limitation upon the States, but it consistently has distinguished between outright protectionism and more indirect burdens on the free flow of trade. The Court has observed that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Id.*, at 624. In contrast, legislation that visits its effects equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn. The Court stated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld

> unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*, at 142.

See also *Hughes* v. *Oklahoma*, 441 U. S., at 336; *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 353 (1977); *Great A&P Tea Co.* v. *Cottrell*, 424 U. S., at 371–372; *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 443 (1960). The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects. See *Hughes* v. *Oklahoma*, 441 U. S., at 336; *Best & Co.* v. *Maxwell*, 311 U. S. 454, 455–456 (1940).

III

With these principles in mind, we first turn to § 659.141 (1). This statute has been the chief object of controversy, since it is the statute that prevents appellees from setting up their projected investment advisory business within Florida. The statute prohibits ownership of local investment or trust businesses by firms possessing two characteristics: a certain kind of business organization and purpose, whether it be as a bank, trust company, or a bank holding company; and location of principal operations outside Florida.

Appellant and the *amici* supporting his position argue that the District Court's analysis of § 659.141 (1) is flawed in three respects: First, the statute assertedly affects only matters of local character that have insufficient interstate attributes to bring federal constitutional limitations into play.[6] Second,

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[6] Appellant advanced this argument in the District Court but has substantially departed from it on appeal. Supporting *amici*, however, con-

the District Court erroneously labeled the statute protectionist legislation and thus incorrectly relied upon the "*per se* rule of invalidity" identified in *Philadelphia* v. *New Jersey*, 437 U. S., at 624. Appellant argues that the statute should be treated as neutral legislation subject to the less stringent standards of *Pike* v. *Bruce Church, Inc., supra*, and he argues that it meets this test. Third, the District Court failed to accord proper significance, in appellant's view, to the Bank Holding Company Act of 1956. Appellant argues that the Act grants authority to the States to prohibit out-of-state bank holding companies from owning local subsidiaries that provide bank-related services.

A

The first of these arguments needs only brief mention. We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern. As appellees freely concede, Brief for Appellees 17, n. 10, sound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people. Thus, it is not surprising that ever since the early days of our Republic, the States have chartered banks and have actively regulated their activities.

Nonetheless, it does not follow that these same activities lack important interstate attributes. An impressive array of federal statutes regulating not only the provision of banking services but also the formation of banking organizations, the rendering of investment advice, and the conduct of national investment markets, is substantial evidence to the contrary.[7]

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tinue to press the contention. See, *e. g.*, Brief for Conference of State Bank Supervisors as *Amicus Curiae* 8–12.

[7] Some of the leading examples of federal regulation of banking, trust, and investment businesses include the National Bank Act, 12 U. S. C. § 21 *et seq.*; the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.*; the Securities Exchange Act of 1934, 48 Stat. 881, as

We do not understand appellant to dispute the validity of these enactments, all of which rest primarily on Congress' powers under the Commerce Clause. Indeed, appellant's arguments under the Bank Holding Company Act assume the validity of federal regulation in this sphere. This Court has observed that the same interstate attributes that establish Congress' power to regulate commerce also support constitutional limitations on the powers of the States. *Philadelphia* v. *New Jersey*, 437 U. S., at 622–623. For present purposes, it is clear that those limitations apply.

B

The contentions that the District Court erred by applying too stringent a standard in defining the limits of Florida's regulatory authority, and that § 659.141 (1) is evenhanded local regulation, are more substantial. We nonetheless agree with the District Court's conclusion that this statute is "parochial" in the sense that it overtly prevents foreign enterprises from competing in local markets.

The statute makes the out-of-state location of a bank holding company's principal operations an explicit barrier to the presence of an investment subsidiary within the State. As Bankers Trust's application before the Board itself indicates, it thus prevents competition in local markets by out-of-state firms with the kinds of resources and business interests that make them likely to attempt *de novo* entry. Appellant virtually concedes this effect, Brief for Appellant 59, and the circumstances of enactment suggest that it was the legislature's principal objective.

Appellant argues, however, that the statute ought not to be

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amended, 15 U. S. C. § 78a *et seq.*; the Trust Indenture Act of 1939, 53 Stat. 1149, as amended, 15 U. S. C. § 77aaa *et seq.*; and the Investment Company Act of 1940, 54 Stat. 789, as amended, 15 U. S. C. § 80a–1 *et seq.* For an express finding on the effect of investment advisory activities on interstate commerce, see Investment Advisors Act of 1940, § 201, 54 Stat. 847, 15 U. S. C. § 80b–1.

declared *per se* invalid because it does not prevent all out-of-state investment enterprises from entering local markets. Investment enterprises that are *not* bank holding companies, banks, or trust companies either may own investment subsidiaries in Florida or may enter the state investment market directly by obtaining a license to do business. Furthermore, locally incorporated bank holding companies are subject to the same restrictions as their foreign counterparts if they maintain their principal operations elsewhere. Appellant thus analogizes § 659.141 (1) to the Maryland statute prohibiting local retail operations by vertically integrated petroleum companies that the Court upheld in *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978). The statute, it is said, discriminates against a particular kind of corporate organizational structure more than it does against the origin or citizenship of a particular business enterprise.

The statute involved in *Exxon* flatly prohibited producers and refiners of petroleum products from opening or operating retail services within Maryland under a variety of corporate or contractual arrangements. *Id.*, at 120, n. 1. It was enacted in response to perceived inequities in the allocation of petroleum products to retail outlets during the fuel shortage of 1973. Various oil companies, all of which engaged in production and refining as well as in sale of petroleum products, challenged the statute on a number of grounds. Among other arguments, they claimed that the statute violated the Commerce Clause because it discriminated against producers and refiners, all of which were interstate concerns, in favor of independent retailers, most of which were local businesses.

The Court rejected this contention. After holding that the statute served the legitimate state purpose of "controlling the gasoline retail market," *id.*, at 125, the Court separately analyzed its effect on interstate commerce in the producing-refining and retailing ends of the petroleum industry. The Court concluded that the statute could not discriminate

against interstate petroleum producers and refiners in favor of locally based competitors because, as a matter of fact, there were no such local producers or refiners to be favored. *Ibid.* For the same reason, it concluded that the flow of petroleum products in interstate commerce would not be reduced. *Id.*, at 127. It also rejected a claim of discrimination at the retail level because the statute placed "no barriers whatsoever" on competition in local markets by "interstate independent dealers" that did not own production or refining facilities. *Id.*, at 126. Despite the fact that the number of stations operated by independent dealers was small relative to the number operated by producer-refiners, the Court concluded that neither the placing of a disparate burden on some interstate competitors nor the shifting of business from one part of the interstate market to another was enough, under the circumstances, to establish a Commerce Clause violation. *Id.*, at 126–127.

There are some points of similarity between *Exxon* and the present case. In the former, the statute in issue discriminated against vertical organization in the petroleum industry. Section 659.141 (1) similarly discriminates against a particular kind of conglomerate organization in the investment and financial industries. And the Maryland statute permitted some kinds of interstate competitors free entry into the local market, as does the Florida statute at issue here.[8]

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[8] Appellant also argues that the present statute, like the one in *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 125, has no discernible impact on the flow of goods in interstate commerce. Locally owned investment businesses are as free to channel their clients' investments into interstate markets as their interstate competitors. The validity of this argument cannot be determined on this record. In the *Exxon* case, as we have noted, all petroleum products sold in the State were produced and refined elsewhere. In contrast, investments may be directed into local as well as interstate markets. Since it is at least conceivable that an investment subsidiary owned by a locally operating bank holding company would be more likely to recommend investments in local busi-

We disagree, however, with the suggestion that *Exxon* should be treated as controlling precedent for this case. Section 659.141 (1) engages in an additional form of discrimination that is highly significant for purposes of Commerce Clause analysis. Under the Florida statute, discrimination against affected business organizations is *not* evenhanded because only banks, bank holding companies, and trust companies with principal operations *outside* Florida are prohibited from operating investment subsidiaries or giving investment advice within the State. It follows that § 659.141 (1) discriminates *among* affected business entities according to the extent of their contacts with the local economy. The absence of a similar discrimination between interstate and local producer-refiners was a most critical factor in *Exxon*. Both on its face and in actual effect, § 659.141 (1) thus displays a local favoritism or protectionism that significantly alters its Commerce Clause status. See *Philadelphia* v. *New Jersey*, 437 U. S., at 626–627; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S., at 527.[9]

We need not decide whether this difference is sufficient to render the Florida legislation *per se* invalid, for we are convinced that the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns. In the District Court and to some extent on this appeal, appellant and supporting *amici* have argued that the Florida legislation advances several important state policies. Among those that

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nesses, we decline to assign any weight to this argument in the absence of proof concerning the actual effect of the Florida statute.

[9] Appellant's argument that § 659.141 (1) could also apply to locally organized bank holding companies, if they maintained their principal operations outside the State, is significantly weakened by federal restrictions on interstate expansion of a bank holding company's banking activities discussed in Part III–C, *infra*. As a result of these statutes, it is unlikely that many local bank holding companies would have their principal operations elsewhere. In any event, discrimination based on the extent of local operations is itself enough to establish the kind of local protectionism we have identified.

have been specifically identified are an interest in discouraging undue economic concentration in the arena of high finance; an interest in regulating financial practices, presumably to protect local residents from fraud; and an interest in maximizing local control over locally based financial activities. We think that these alleged purposes fail to justify the extent of the burden placed upon out-of-state bank holding companies.

Discouraging economic concentration and protecting the citizenry against fraud are undoubtedly legitimate state interests. But we are not persuaded that these interests justify the heavily disproportionate burden this statute places on bank holding companies that operate principally outside the State. Appellant has demonstrated no basis for an inference that all out-of-state bank holding companies are likely to possess the evils of monopoly power, that they are more likely to do so than their homegrown counterparts, or that they are any more inclined to engage in sharp practices than bank holding companies that are locally based.[10] Nor is there any reason to conclude that outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecting against the presumed evils, particularly when other out-of-state businesses that may be just as large or far-flung are permitted to compete in the local market. We conclude that these asserted state interests simply do not suffice to eliminate § 659.141 (1)'s apparent constitutional defect. Cf. *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S., at 353–354; *Great A&P Tea Co.* v. *Cottrell*, 424 U. S., at 375–376.

With regard to the asserted interest in promoting local control over financial institutions, we doubt that the interest itself is entirely clear of any tinge of local parochialism. In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or

[10] Both in-state and out-of-state bank holding companies, of course, are subject to extensive regulation by the Federal Government designed to protect against these same evils.

wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition. See *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 538; *Buck* v. *Kuykendall*, 267 U. S. 307, 315–316 (1925); cf. *Toomer* v. *Witsell*, 334 U. S. 385, 403–404 (1948). In any event, the interest is not well served by the present legislation. The statute, for example, does not restrict out-of-state ownership of local bank holding companies. Nor, as appellant concedes, does it prevent entry by out-of-state entities other than those having the prohibited organizational forms. There is thus no reason to believe that the State's interest in local control, to the extent it legitimately exists, has been significantly or evenhandedly advanced by the statutory means that have been employed.

For these reasons, we conclude that the District Court did not err in holding that § 659.141 (1) directly burdens interstate commerce in a manner that contravenes the Commerce Clause's implicit limitation on state power.

C

Ordinarily, at this point we would have reached the end of our inquiry. But in this instance appellant has another string to his bow: the contention that by Act of Congress the State has been given additional authority to regulate entry by bank holding companies into the local investment advisory market. Congress, of course, has power to regulate the flow of interstate commerce in ways that the States, acting independently, may not. And Congress, if it chooses, may exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. See *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 542–543; *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 423–424 (1946); *International Shoe Co.* v. *Washington*, 326 U. S. 310, 315 (1945). It is appellant's view

that the Bank Holding Company Act of 1956, as amended, is enabling legislation of this very kind, and that it authorizes the restrictions on bank holding companies embodied in § 659.141 (1).

This argument rests on two provisions in the federal legislation. Section 3 (d) of the Act, 12 U. S. C. § 1842 (d), prohibits the Board from approving an application by a bank holding company to acquire "any additional bank" located outside the State in which the holding company has its principal operations, unless that acquisition is specifically authorized by the statutory law of the State in which the proposed acquisition is located.[11] Section 7 of the Act, 12 U. S. C. § 1846, reserves to the States a continuing role in the regulation of bank holding companies.[12] Appellant argues that

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[11] Appellant relies on that part of § 3 (d) of the Bank Holding Company Act of 1956, 70 Stat. 135, as amended, 80 Stat. 238, 12 U. S. C. § 1842 (d), which provides:

"Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment [July 1, 1966] or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest."

A new subsection was added to this statute effective March 31, 1980. See Part IV, *infra*.

[12] Section 7 provides:

"The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with

either or both of these provisions authorize the State to prohibit out-of-state bank holding companies from acquiring local investment subsidiaries.

The Bank Holding Company Act of 1956 was enacted to accomplish two primary objectives. First, it was designed to prevent the concentration of banking resources in the hands of a few financial giants. Second, it was intended to implement a congressional policy against control of banking and nonbanking enterprises by a single business entity. See S. Rep. No. 1095, 84th Cong., 1st Sess., 2 (1955); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U. S. 234, 242–243 (1978). Underlying both objectives was a desire to prevent anticompetitive tendencies in national credit markets. See S. Rep. No. 91–1084, pp. 2–3 (1970).

Congress sought to accomplish these twin goals through separate statutory provisions. Section 3 of the Act placed limitations on the creation of bank holding companies and their expansion within the banking field. Section 3 (a) required Board approval for such activities as formation of bank holding companies, acquisition of bank stock or assets by such holding companies or their subsidiaries, and merger of bank holding companies. Section 3 (c) specified criteria to be considered by the Board in determining whether to grant approval. Section 4 sharply curtailed acquisition of nonbanking enterprises. Section 4 (a) generally forbade future acquisition of nonbanking enterprises. What was then § 4 (c)(6), however, carved out an exception for companies "of a financial, fiduciary, or insurance nature" if the Board determined that they are "so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto." 70 Stat. 137.

When this legislation was first proposed to the Senate, neither § 3 nor § 4 contained explicit limitations on interstate

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respect to banks, bank holding companies, and subsidiaries thereof." 70 Stat. 138.

expansion by bank holding companies. See S. 2577, 84th Cong., 1st Sess., §§ 3, 4 (1955). But Senator Douglas introduced an amendment to § 3 prohibiting bank holding companies from expanding into banking across state lines. He argued that such an amendment was desirable in order to ensure that national banks would not use bank holding companies as mechanisms to evade state-law restrictions on branching of banks recognized and made applicable to national banks by the McFadden Act, 12 U. S. C. § 36. See 102 Cong. Rec. 6860 (1956) (remarks of Sen. Douglas). The Senate agreed to the amendment. A similar provision had been included in the companion bill introduced in the House of Representatives. See H. R. Rep. No. 609, 84th Cong., 1st Sess., 2–5, 15, 24 (1955). The "Douglas Amendment" emerged as § 3 (d) of the Act, the first of the two provisions on which appellant relies.

We conclude that § 3 (d) offers scant support for the portions of § 659.141 (1) subject to challenge in this proceeding. Preliminarily, it is doubtful that § 3 (d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited. Furthermore, the structure of the Act reveals that § 3 (d) applies only to holding company acquisitions of banks. Nonbanking activities are regulated separately in § 4, which does not contain a parallel provision. Even if § 3 (d) could be interpreted to authorize additional state regulation, ordinary canons of interpretation thus would lead to the inference that restraints so authorized could apply only to a holding company's banking activities.[13]

[13] Appellant attempts to answer the latter of these observations by arguing that the restrictions of § 3 (d) implicitly placed geographical

In contrast to § 3 (d), § 7 of the Act does reserve to the States a general power to enact regulations applicable to bank holding companies. This section was intended to preserve

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limitations on the expansion of nonbanking activities as well. Appellant asserts that the Board initially gave § 4 (c) a narrow interpretation that effectively prohibited holding companies from owning nonbanking subsidiaries unless they were closely related to an existing banking operation controlled by the parent company. See, *e. g., Transamerica Corp.*, 43 Fed. Res. Bull. 1014, 1016–1017 (1957). Since such banking operations were geographically confined by virtue of § 3 (d), the Board's restrictive application of § 4 (c) assertedly applied the same limitation to nonbanking operations.

We agree with appellees that this argument has been significantly undercut by 1970 amendments to the Act that revised the language of § 4 (c). Although the principal purpose of those amendments was to extend the regulatory controls of the Act to one-bank holding companies that were formerly exempt, Congress also adopted changes designed to give the Board greater discretion in administering the Act. See S. Rep. No. 91–1084, pp. 12–13 (1970); H. R. Rep. No. 91–387, p. 14 (1969); see also Chase, The Emerging Financial Conglomerate: Liberalization of the Bank Holding Company Act, 60 Geo. L. J. 1225, 1236–1237 (1972). The Federal Reserve Board proposed several changes in § 4 (c) designed to liberalize the standards for expansion into "related" nonbanking enterprises. These proposals met with different receptions in the two Houses of Congress, and the final product was a compromise. A proposal to substitute the phrase "functionally related" for "closely related" was not adopted; but the phrase "financial, fiduciary, or insurance nature" was dropped from the statute, and "business of banking" was changed simply to "banking." Bank Holding Company Act Amendments of 1970, Pub. L. 91–607, § 103, 84 Stat. 1763; see Note, 39 Geo. Wash. L. Rev. 1200, 1219–1223 (1971).

There was substantial disagreement among House and Senate conferees over the exact import of these changes with respect to the breadth of nonbanking activities that the amendments would permit. Compare H. R. Conf. Rep. No. 91–1747, p. 21 (1970), and 116 Cong. Rec. 41950–41952 (1970) (remarks of Rep. Patman), with *id.*, at 41953–41954 (remarks of Rep. Widnall); *id.*, at 42424 (remarks of Sen. Sparkman); *id.*, at 42435–42436 (remarks of Sen. Bennett). See also Note, 71 Mich. L. Rev. 1170, 1206–1207 (1973). We need not enter that debate at this juncture. For present purposes, it is sufficient to note that the change from "business of banking" to "banking" was explicitly proposed in order to free

existing state regulations of bank holding companies, even if they were more restrictive than federal law. See S. Rep. No. 1095, 84th Cong., 1st Sess., 22 (1955). But we find nothing in its language or legislative history to support the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation. Rather, it appears that Congress' concern was to define the extent of the federal legislation's pre-emptive effect on state law. In response to criticisms of the provision on the ground that it might be interpreted to expand state authority, one Committee Report stated that it was intended "to preserve to the States those powers which they now have in our dual banking system," yet "to make it clear that a State could not enact legislation inconsistent with the [Act] and therefore nullify its effect." S. Rep. No. 1095, 84th Cong., 2d Sess., pt. 2, p. 5 (1956). Far from creating a new state power to discriminate between foreign and local bank holding companies, the legislative history evinces an intent to forestall such a broad interpretation. We therefore conclude that § 7 applies only to state legislation that operates within the boundaries marked by the Commerce Clause.

Since neither of these provisions authorizes state legislation of the variety contained in the challenged portions of § 659.141 (1), we agree with the District Court that appellant's reliance on the Bank Holding Company Act is misplaced. The effects of the Florida statute on interstate commerce have not been permitted by Congress, and its Commerce Clause defects have not been removed. Therefore, the District Court's injunction against enforcement of the statute must be sustained.

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the Board from its prior requirement of relationship to a bank holding company's existing banking enterprises. See S. Rep. No. 91–1084, p. 12 (1970); Letter dated November 23, 1970, from Arthur Burns, Federal Reserve Board Chairman, to Representative Patman, reprinted in 116 Cong. Rec. 41959 (1970); see also Note, 39 Geo. Wash. L. Rev., at 1220. Once that change was made, the implicit geographical limitation appellant infers from previous applications of the Act was removed along with the language from which it was derived.

IV

This brings us, finally, to § 660.10. That statute prohibits all corporations except state-chartered banks and national banks having their operations in Florida from performing specified fiduciary functions. It does not purport to regulate the ownership of such institutions by bank holding companies. For the reasons stated below, we conclude that its constitutionality has been neither fully placed in issue nor fully determined by the District Court's decision. We therefore vacate the judgment with respect to § 660.10 and remand for such further proceedings as may be necessary in light of this opinion.

As we have already noted, appellees' complaint challenged the constitutionality of § 660.10 only insofar as it operated in conjunction with § 659.141 (1). The District Court followed the same approach, and it granted declaratory relief against § 660.10 on that basis. Jointly, of course, the statutes not only limit the kinds of corporations that may perform fiduciary functions within Florida, but also prevent out-of-state bank holding companies from owning such corporations as their subsidiaries. It was this joint effect that led the District Court to find that § 660.10 "cordons off Florida trust companies from competition by out-of-state concerns." 461 F. Supp., at 1196. Having so found, the District Court did not address the constitutionality of § 660.10 standing alone. It did not consider, for example, which of the many functions regulated by § 660.10 were in issue, or whether any of the exceptions created by that statute might apply. Indeed, it refused to grant injunctive relief against that statute and ruled that any challenge to its enforcement was premature. 461 F. Supp., at 1201.

On this appeal the argument over the constitutionality of § 660.10 has focused not on the concatenation of the two statutes, but on the power of a State under the Commerce Clause to require local incorporation as a condition of doing busi-

ness in local markets. Cf. *Railway Express Agency, Inc.* v. *Virginia*, 282 U. S. 440 (1931). Because of the approach taken in the District Court, however, there has been no definitive ruling on this issue. The court may have touched obliquely on the question when it declared, on a motion for clarification, that a State may not wholly exclude foreign corporations from doing business in the State. See App. to Juris. Statement E2. But it made no specific determination whether § 660.10 would have such an effect, and it refused to speculate about the impact that enforcement of the statute might have upon appellees.

Nor is it clear that there is a present case or controversy with respect to the validity of the separate requirements imposed by § 660.10. As we have noted, appellees' complaint does not expressly join battle on this issue. The facts of the case show, moreover, that it was § 659.141 (1) that prevented BTIM's entry into Florida. The application before the Board specified that BTIM would perform only investment advisory services that are outside the scope of § 660.10. Bankers Trust had not yet processed an application to the Board for permission to form a Florida trust subsidiary, and the Board had not yet determined whether such a subsidiary could be approved as a matter of federal law. The parties did stipulate that Bankers Trust would attempt to organize a Florida subsidiary having fiduciary powers were it not prohibited by state law from doing so. But we interpret this stipulation to mean that Bankers Trust was willing to comply with a local incorporation requirement, without contesting its validity, so long as it was not prohibited entirely from establishing a trust subsidiary in the State. Accordingly, the District Court may not have been in a position to decide the broad question the parties now ask us to resolve, even if that question had been clearly raised by the pleadings.

One further consideration counsels against our attempting to evaluate the validity of § 660.10 at this juncture. Since we noted probable jurisdiction of this appeal, Congress has

amended § 3 (d) of the Bank Holding Company Act to extend its restrictions on interstate expansion to fiduciary organizations of the kind Bankers Trust has stipulated it would attempt to organize in Florida. Depository Institutions Deregulation and Monetary Control Act of 1980, § 712 (b), Pub. L. 96–221, 94 Stat. 189 (Mar. 31, 1980).[14] It thus appears that Bankers Trust is presently prohibited by federal law from establishing a Florida trust subsidiary. This amendment is "repealed" by its own terms, § 712 (c), as of October 1, 1981, and there are indications in the legislative history that it was intended as a temporary moratorium on approval of trust company applications rather than as a prelude to more permanent restrictions. Nevertheless, we must review the judgment below in the light of both state and federal law as it now stands. See *Diffenderfer* v. *Central Baptist Church*, 404 U. S. 412, 414 (1972). This enactment raises new questions,

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[14] This statute provides:

"Section 3 (d) of the Bank Holding Company Act of 1956 (12 U. S. C. § 1842 (d)) is amended by inserting (1) after (d) and by adding at the end thereof the following:

"(2)(A) Except as provided in subparagraph (B), the restrictions contained in paragraph (1) regarding the acquisition of shares or assets of, or interests in, an additional bank shall apply to the acquisition of shares or assets of, or interests in, a trust company.

"(B) Subparagraph (A) shall not apply with respect to the acquisition of shares or assets of, or interests in, a trust company if such acquisition was approved by the Board on or before March 5, 1980, and if such trust company opened for business and was operating on or before March 5, 1980.

"(C) For the purpose of this paragraph, the term 'trust company' means any company whose powers are limited to the powers specified in subsection (a) of the first section of the Act entitled 'An Act to place authority over the trust powers of national banks in the Comptroller of the Currency,' approved September 28, 1962 (12 U. S. C. § 92a), for a national bank located in the same State in which such trust company is located.

"(c) The amendments made by this section are hereby repealed on October 1, 1981."

both jurisdictional and substantive, that should be addressed in the first instance by the District Court.

For these reasons, we determine that the constitutionality of § 660.10's limitation on the types of corporations that may perform trust responsibilities is not properly before us at this stage in the proceedings.

V

In summary, we affirm the judgment of the District Court insofar as it declares unconstitutional the challenged portions of § 659.141 (1) and enjoins their enforcement. We vacate that portion of the judgment that relates to the constitutionality of § 660.10, and we remand the case for such further proceedings as are appropriate and consistent with this opinion.[15]

It is so ordered.

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[15] Florida's Regulatory Reform Act of 1976, 1976 Fla. Laws, ch. 76-168, § 3 (2)(t), repeals, as of July 1, 1980, chs. 659 and 660 of the Florida Statutes "relating to banking." These chapters include §§ 659.141 (1) and 660.10. Section 2 of ch. 76-168 recites that it is "the intent of the Legislature . . . [t]o provide systematic legislative review of [licensing and regulation of businesses] . . . by a periodic review and termination, modification, or reestablishment of such programs and functions."

We are advised that pending in the Florida Legislature at the present time are S. B. 347 and a House substitute for S. B. 347; that both bills leave the substance of §§ 659.141 (1) and 660.10 intact for the express purpose of not mooting out pending litigation; and that action on these bills will be taken before the legislature adjourns. As of the date this opinion is filed, §§ 659.141 (1) and 660.10 remain in effect so the case has not become moot, whatever the ultimate disposition of the pending bills.

NEW YORK GASLIGHT CLUB, INC., ET AL. *v.* CAREY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79–192. Argued February 19, 1980—Decided June 9, 1980

Section 706 (k) of Title VII of the Civil Rights Act of 1964 provides that in "any action or proceeding under this title" the court may allow attorney's fees to "the prevailing party," other than the Equal Employment Opportunity Commission (EEOC) or the United States. Alleging that petitioners had denied her employment because of her race, respondent filed an employment discrimination charge with the EEOC, which, as required by Title VII, forwarded the complaint to the appropriate New York administrative agency. Respondent was represented by counsel throughout administrative and judicial proceedings in the state system, which proceedings ultimately resulted in affirmance of the state agency's order directing petitioners to offer respondent employment and pay back wages but not awarding attorney's fees. Meanwhile, the EEOC reassumed jurisdiction and, under § 706 (f) of Title VII, issued a right-to-sue letter to respondent, who filed suit in Federal District Court, alleging a claim under Title VII, *inter alia*, and seeking appropriate relief, including attorney's fees. Petitioners having agreed to comply with the state agency's order, the District Court dismissed the federal action, except for respondent's request for attorney's fees, including fees for her attorney's services in the state proceedings. The court later denied the fee request, ruling that although the EEOC's issuance of a right-to-sue letter had forced respondent to preserve her rights by filing a complaint in federal court, the mere filing of a federal suit did not entitle an aggrieved party to attorney's fees, and that respondent had the option of pursuing her state administrative remedies without incurring any expenses for legal services, since state law provides that the case in support of the complaint is to be presented to the administrative hearing examiner by one of the state agency's attorneys. The Court of Appeals reversed.

Held: Sections 706 (f) and 706 (k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state administrative and judicial proceedings to which the complainant was referred pursuant to the provisions of Title VII, and no special circumstances exist in this case that would justify denial of a fee award. Pp. 60–71.

(a) Congress' use of the broadly inclusive disjunctive phrase "any action or proceeding" in § 706 (k) indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings. Other provisions of the statute that interact with § 706 (k), the purpose of § 706 (k) to facilitate the bringing of discrimination complaints, the humanitarian remedial policies of Title VII, and the statute's structure of cooperation between federal and state enforcement authorities—calling for deferral to state proceedings, with proceedings before the EEOC and in federal courts being supplements to available state remedies—all point to the conclusion that fee awards are authorized for work done in state administrative or judicial proceedings as well as in federal proceedings. Since Congress intended to authorize fee awards for work done in administrative proceedings, § 706 (f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state or local proceedings. Pp. 60–66.

(b) Awarding fees for work done in state proceedings for which the State does not authorize fees does not infringe on the State's powers under the Tenth Amendment, since Congress' power under § 5 of the Fourteenth Amendment is broad and overrides any interest the State might have in not authorizing awards for fees. Nor is there any merit in the argument that Congress' intent to pre-empt the state law has not been clearly expressed. Section 706 (k) does not "pre-empt" state law, since § 706 (f)(1) merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums, and one aspect of complete relief is an award of attorney's fees, which Congress considered necessary for the fulfillment of federal goals. And even if it can be said that § 706 (k) pre-empts the state rule, Congress' intent to achieve this result is manifest. Furthermore, the availability under New York law of an agency attorney to present the case in support of the complaint at the public hearing is not a "special circumstance" depriving a prevailing complainant of a fee award, since a private attorney is needed to assist the complainant during administrative procedures before and after the public-hearing stage, and even if an agency attorney appears at the public hearing, he does not represent the complainant's interests, but rather those of the State. Pp. 66–70.

598 F. 2d 1253, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined, and in all but n. 6 of which BURGER, C. J., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 71. WHITE and REHNQUIST, JJ., filed a dissenting statement, *post*, p. 71.

Albert N. Proujansky argued the cause for petitioners. With him on the brief was *Marvin Luboff*.

James I. Meyerson argued the cause and filed a brief for respondent.

Harriet S. Shapiro argued the cause for the United States et al. as *amici curiae* urging affirmance. With her on the brief were *Solicitor General McCree, Assistant Attorney General Days, Leroy D. Clark, Joseph T. Eddins,* and *Lutz Alexander Prager.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether, under Title VII of the Civil Rights Act of 1964, a federal court may allow the prevailing party attorney's fees for legal services performed in prosecuting an employment discrimination claim in *state* administrative and judicial proceedings that Title VII requires federal claimants to invoke.

I

Respondent Cidni Carey, in August 1974, applied for work as a cocktail waitress with petitioner New York Gaslight Club, Inc. After an interview, she was advised that no position was available.

The following January, respondent filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that petitioners, the Club and its manager, had denied her a position because of her race. App. to Brief for Respondent a1–a3. As required by § 706 (c) of Title VII of the Civil

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*Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams*, Attorney General, *pro se*, *Shirley Adelson Siegel*, Solicitor General, *Judith T. Kramer, Arnold Fleischer*, and *Barbara Levy*, Assistant Attorneys General, and *Ann Thacher Anderson* for the New York State Attorney General et al.; by *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston*, and *Bill Lann Lee* for the NAACP Legal Defense and Educational Fund, Inc.; and by *Charles C. Parlin, Jr.*, and *Peter Bienstock* for the Puerto Rican Legal Defense & Education Fund, Inc.

Rights Act of 1964, 78 Stat. 259, as redesignated, 86 Stat. 104, 42 U. S. C. § 2000e–5 (c), respondent's complaint was forwarded to the New York State Division of Human Rights (Division).

In May 1975, after an investigation during which respondent was represented by counsel,[1] the Division found probable cause to believe that petitioners had engaged in an unlawful discriminatory practice. Efforts at conciliation failed, and the Division, pursuant to N. Y. Exec. Law § 297 (4)(a) (McKinney Supp. 1979), recommended that a public hearing be held.

Counsel for respondent wrote to the EEOC on May 20, advising the Commission that respondent was proceeding in the Division. He asked that the Commission "reassume" jurisdiction over the claim so that, if necessary, respondent could obtain a right-to-sue letter at an appropriate time. On May 22, the EEOC responded, stating that an investigator would be assigned to respondent's matter as soon as possible.

The state administrative hearing was held on two separate days in late 1975 and early 1976. Both respondent and petitioners were represented by counsel. App. 68. No attorney for the State appeared. On August 13, 1976, the hearing examiner found that petitioners had discriminated against respondent because she is black. *Id.*, at 70. Petitioners were ordered to offer respondent employment as a cocktail waitress and to pay her back wages from August 1974. *Id.*, at 70–72. No attorney's fee was awarded.

Petitioners appealed to the New York State Human Rights Appeal Board, an agency established to hear appeals from orders of the Division. N. Y. Exec. Law § 297–a (McKinney 1972 and Supp. 1979). The Board held a hearing in December 1976 at which counsel for petitioners, respondent, and the Division appeared.

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[1] Respondent was represented by counsel employed by the NAACP Special Contribution Fund.

Meanwhile, EEOC proceedings had begun. Giving due weight to the state finding of probable cause, see § 706 (b), 42 U. S. C. § 2000e–5 (b), the EEOC determined that there was reasonable cause to believe petitioners had violated Title VII. The EEOC's attempts at conciliation also failed. The Commission's General Counsel chose not to sue, and, as required by § 706 (f)(1), § 2000e–5 (f)(1), the EEOC issued respondent a right-to-sue letter. This was issued on July 13, 1977; respondent, under § 706 (f)(1), then had 90 days to file a Title VII action in federal district court.

On August 26, the Appeal Board confirmed the Division's order. Petitioners immediately appealed the Board's decision to the New York Supreme Court. The Division cross-petitioned for enforcement of its order.

On September 30, respondent filed suit in the United States District Court for the Southern District of New York, asserting claims under the Civil Rights Act of 1866, 42 U. S. C. § 1981, Title VII, and the Thirteenth Amendment. App. 29. Respondent alleged that petitioners did not hire her because she is black, and that petitioner Club had employed only four blacks as waitresses during its 20-year existence. The complaint sought a declaratory judgment that petitioners' practices were unlawful under federal law, an order requiring petitioners to hire respondent, backpay with interest, retroactive employment-related benefits, attorney's fees, and other appropriate relief. Petitioners' answer denied virtually all the allegations in the complaint and cited the pendency of the state proceedings as an affirmative defense.

The Appellate Division of the New York Supreme Court on November 3 unanimously affirmed the Appeal Board's determination. *New York Gaslight Club, Inc.* v. *New York State Human Rights Appeal Board*, 59 App. Div. 2d 852, 399 N. Y. S. 2d 158 (1977). Petitioners unsuccessfully moved for reargument, and then filed a motion with the New York Court of Appeals for leave to appeal.

On February 3, 1978, while that motion was pending, the Federal District Court held a pretrial conference, after which petitioners agreed that if the state court denied their motion for leave to appeal, they would comply with the Division's order. App. 73. One week later the New York Court of Appeals denied petitioners' motion. 43 N. Y. 2d 951 (1978).

The parties thereafter apparently agreed that the federal action could be dismissed, except for respondent's request for attorney's fees. See App. 75–79. Respondent sought an award for 82 hours of attorney's time. Of that total, 9 hours were spent in preparing and filing the EEOC charge and the federal suit, 22 hours were spent in preparing and presenting the case before the hearing examiner, 29 hours were spent in defending the Division's order before the Appeal Board and the state courts, and 22 hours were spent seeking the fee award. App. to Pet. for Cert. A39–A40.

In July 1978, the District Court dismissed respondent's complaint, App. 35, but left pending the application for attorney's fees. After further briefing, the court denied the fee request. 458 F. Supp. 79 (SDNY 1978).

The District Court found the propriety of the EEOC's issuance of a right-to-sue letter while state proceedings were pending "very doubtful." *Id.*, at 80. Although the EEOC's action had given respondent no choice but to preserve her rights by filing a complaint in federal court, the District Court ruled that the mere filing of a federal suit does not entitle an aggrieved party to attorney's fees. The court reasoned that the fortuity of a need to file a protective federal suit should not make the defendants responsible for the costs of representing the plaintiff in the state forums. *Id.*, at 81.

The District Court also relied on its conclusion that respondent "had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services," since state law, N. Y. Exec. Law § 297 (4)(a) (McKinney Supp. 1978), provides that the case in support of the complaint is to be presented to the hearing examiner by one

of the attorneys for the Division. 458 F. Supp., at 81. The decision in *Parker* v. *Califano*, 182 U. S. App. D. C. 322, 561 F. 2d 320 (1977), upholding an award of attorney's fees for prosecution of a federal employee's Title VII claim in mandatory preliminary proceedings within the employee's agency, was distinguished on the ground that the agency did not provide an independent attorney to prosecute the complaint. 458 F. Supp., at 81.

A divided panel of the United States Court of Appeals for the Second Circuit reversed. 598 F. 2d 1253 (1979). The court ruled: "A complaining party who is successful in state administrative proceedings after having her complaint under Title VII referred to a state agency in accordance with the statutory scheme of that Title is entitled to recover attorney's fees in the same manner as a party who prevails in federal court." *Id.*, at 1260. The court relied on several factors in reaching its decision. Among them were the significant role of state human rights agencies in the Title VII enforcement scheme; the statute's strong preference for administrative resolution of a discrimination complaint; the importance of providing an incentive for complete development of the administrative record; the language of the statute's fee provision; and the desirability of encouraging a complainant to retain private counsel notwithstanding participation of a Division attorney at certain points during the state proceedings.

We granted certiorari, 444 U. S. 897 (1979), to consider this question that is significant to the enforcement of the antidiscrimination provisions of Title VII.

II

Section 706 (k) of the Civil Rights Act of 1964, 78 Stat. 261, 42 U. S. C. § 2000e–5 (k), provides:

> "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs."

The question presented is whether, in the words of the statute, respondent was the "prevailing party" in an "action or proceeding under this title." An examination of the language and history of the statute, the nature of the proceedings in which respondent participated, and the relationship of those proceedings to Title VII's enforcement mechanisms, together persuade us that Congress clearly intended to authorize awards of attorney's fees to persons in respondent's situation.

The words of § 706 (k) leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings. This conclusion is supported by a comparison of § 706 (k) with another fee provision in the same Act, namely, § 204 (b) of Title II, 78 Stat. 244, 42 U. S. C. § 2000a–3 (b). The pertinent language of § 204 (b) is identical to that of § 706 (k) except that § 204 (b) permits an award only with respect to "any action commenced pursuant to this title." The two provisions were enacted contemporaneously as parts of the Civil Rights Act of 1964. The omission of the words "or proceeding" from § 204 (b) is understandable, since enforcement of Title II depends solely on court actions. See *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 401 (1968). It is apparent, therefore, that the two fee provisions were carefully tailored to the enforcement scheme of each Title. It cannot be assumed that the words "or proceeding" in § 706 (k) are mere surplusage.

It might be argued that the words "or proceeding" authorize fee awards only for work done in federal administrative proceedings,[2] such as those before the EEOC, but not for

[2] In cases involving federal employees, all the Courts of Appeals that have considered the question have upheld fee awards under § 706 (k) for work done in federal administrative proceedings that must be exhausted

state administrative or state judicial proceedings. This reading at least would not render the words "or proceeding" a complete nullity. We find nothing in the statute, however, to suggest that Congress intended to draw this particular line. Rather, other provisions of the statute that interact with § 706 (k); the purpose of § 706 (k); the humanitarian remedial policies of Title VII; and the statute's structure of cooperation between federal and state enforcement authorities, all point to the opposite conclusion.

Section 706 (k) authorizes a fee award to the prevailing party in "*any* . . . proceeding under this title." (Emphasis added.) The same Title creates the system of deferral to state and local remedies. The statute uses the word "proceeding" to describe the state and local remedies to which complainants are required to resort. For example, § 706 (c), 86 Stat. 104, provides:

> "[N]o charge may be filed . . . before the expiration of sixty days after *proceedings* have been commenced under the State or local law, unless such *proceedings* have been earlier terminated. . . . If any requirement for the commencement of such *proceedings* is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the *proceeding* is based, the *proceeding* shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent. . . ." (Emphasis added).

Indeed, throughout Title VII the word "proceeding," or its plural form, is used to refer to all the different types of proceedings in which the statute is enforced, state and federal,

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as a condition to filing an action in federal court. *E. g., Brown* v. *Bathke*, 588 F. 2d 634, 638 (CA8 1978); *Fischer* v. *Adams*, 572 F. 2d 406 (CA1 1978); *Parker* v. *Califano*, 182 U. S. App. D. C. 322, 561 F. 2d 320 (1977); *Foster* v. *Boorstin*, 182 U. S. App. D. C. 342, 561 F. 2d 340 (1977); *Johnson* v. *United States*, 554 F. 2d 632 (CA4 1977).

administrative and judicial.[3] The conclusion that fees are authorized for work done at the state and local levels is inescapable.

This Court recently examined the legislative history and purpose of § 706 (k). In *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), it was noted that, although the legislative history of § 706 (k) is "sparse," 434 U. S., at 420, it is clear that one of Congress' primary purposes in enacting the section was to "make it easier for a plaintiff of limited means to bring a meritorious suit." *Ibid.*, quoting 110 Cong. Rec. 12724 (1964) (remarks of Sen. Humphrey). Because Congress has cast the Title VII plaintiff in the role of "a private attorney general," vindicating a policy "of the highest priority," a prevailing plaintiff "ordinarily is to be awarded attorney's fees in all but special circumstances." 434 U. S., at 416, 417. See also *Newman* v. *Piggie Park Enterprises*, 390 U. S., at 402. It is clear that Congress intended to facilitate the bringing of discrimination complaints. Permitting an attorney's fee award to one in respondent's situation furthers this goal, while a contrary rule would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim.

Title VII establishes a comprehensive enforcement scheme in which state agencies are given "a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination." *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 755 (1979). Congress envisioned that Title VII's procedures and remedies would "mes[h] nicely, logically, and coherently with the State and city legislation," and that remedying em-

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[3] See, *e. g.*, § 706 (f) (1), 78 Stat. 260, as redesignated, 86 Stat. 105, 42 U. S. C. § 2000e–5 (f) (1) (court may stay "further proceedings" pending the termination of "State or local proceedings"); § 706 (i), 78 Stat. 261, as amended, 86 Stat. 107, 42 U. S. C. § 2000e–5 (i) (Commission may commence "proceedings" to compel compliance with court order).

ployment discrimination would be an area in which "[t]he Federal Government and the State governments could cooperate effectively." 110 Cong. Rec. 7205 (1964) (remarks of Sen. Clark).

Pursuant to this policy of cooperation, Title VII provides that where the unlawful employment practice is alleged to have occurred in a State or locality which has a law prohibiting the practice and in which an agency has been established to enforce that law, "no charge may be filed [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." § 706 (c). In practice, § 706 (c) has resulted in EEOC's development of a referral and deferral system, which the Court approved in *Love* v. *Pullman Co.*, 404 U. S. 522 (1972). When a charge is filed with the EEOC prior to exhaustion of state or local remedies, the Commission refers the complaint to the appropriate local agency. The EEOC then holds the complaint in "suspended animation." *Id.*, at 526. Upon termination of the state proceedings or expiration of the 60-day deferral period, whichever comes first, the EEOC automatically assumes concurrent jurisdiction of the complaint. *Ibid.*[4]

Of course, the "ultimate authority" to secure compliance with Title VII resides in the federal courts. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44–45 (1974). The statute

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[4] Other provisions of Title VII also evidence the policy of promoting federal-state cooperation in enforcement. Section 706 (b), 78 Stat. 259, as redesignated, 86 Stat. 104, 42 U. S. C. § 2000e–5 (b), requires the EEOC to "accord substantial weight" to a state administrative determination, and § 709 (b), 78 Stat. 262, as amended, 86 Stat. 108, 42 U. S. C. § 2000e–8 (b), authorizes the EEOC to "cooperate with State and local agencies charged with the administration of State fair employment practices laws" in funding research and other mutually beneficial projects, and to enter into work-sharing agreements with those agencies to facilitate the processing of complaints.

authorizes civil enforcement actions by both the EEOC and the private plaintiff. After the deferral period, the EEOC assumes jurisdiction, and, "as promptly as possible" it determines whether there is probable cause to believe that the charge is true. § 706 (b). After an additional 30 days, the EEOC is authorized to bring an action, in which the complainant has an absolute right to intervene. § 706 (f). If the Commission does not file suit, or enter into a conciliation agreement to which the complainant is a party, within 180 days after it reassumes jurisdiction, it must issue a "right to sue" letter notifying the complainant of his right to bring an action within 90 days. *Ibid.*[5]

It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief. See *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 48–50.

The construction of § 706 (k) that petitioners advocate clashes with this congressional design. Complainants unable to recover fees in state proceedings may be expected to wait out the 60-day deferral period, while focusing efforts on obtaining federal relief. See n. 6, *infra*. Only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme.

The District Court felt that granting a fee award to respondent would be a "windfall" based on the unforeseeable fortuity that filing a protective federal suit became necessary. 458 F. Supp., at 81. We agree with the District Court that the

[5] We thus disagree with the District Court that the propriety of EEOC's issuance of the right-to-sue letter in this case is "very doubtful." 458 F. Supp. 79, 80 (SDNY 1978). As we read the statute, the Commission was required to issue the letter after 180 days, regardless of the posture of any state proceedings.

availability of a federal fee award for work done in state proceedings following EEOC referral and deferral should not depend upon whether the complainant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees. But our agreement with the District Court compels us to reject its conclusion. It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706 (f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.[6]

III

Against the strong considerations favoring an award of fees, petitioners make three arguments. First, they contend that awarding fees for work done in state proceedings for

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[6] We note that if fees were authorized only when the complainant found an independent reason for suing in federal court under Title VII, such a ground almost always could be found. Section 706 (f)(1) requires the EEOC to give the complainant a "right to sue" letter if, after it assumes concurrent jurisdiction over the complaint, it does not sue within 180 days. Thus, after waiting 240 days (60 days deferral to the state or local agency and 180 days for the EEOC to act after deferral), the complainant appears to have an absolute right to resort to an action in federal court. The federal court may stay the action for a maximum of 60 more days, to permit completion of state proceedings. § 706 (f)(1). It took three years for the New York proceedings in this case finally to provide respondent all the relief she desired other than attorney's fees. It is doubtful that the systems of many States could provide complete relief within 240 days. The existence of an incentive to get into federal court, such as the availability of a fee award, would ensure that almost all Title VII complainants would abandon state proceedings as soon as possible. This, however, would undermine Congress' intent to encourage full use of state remedies.

which the State does not authorize fees[7] infringes on the State's powers under the Tenth Amendment. Second, they argue that Congress' intent to pre-empt the state law has not been clearly expressed. Third, they contend that even if § 706 (k) authorizes fees for work done in state proceedings in some instances, denial of an award here was within the District Court's discretion.

We must reject petitioners' Tenth Amendment argument. Congress' power under § 5 of the Fourteenth Amendment is broad, and overrides any interest the State might have in not authorizing awards for fees in connection with state proceedings. See *Hutto* v. *Finney*, 437 U. S. 678 (1978); *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976).

Petitioners cite *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132 (1963), *Schwartz* v. *Texas*, 344 U. S. 199 (1952), and *Florida* v. *United States*, 282 U. S. 194 (1931), in support of their argument that Congress' intent to pre-empt state regulation of the administration of state proceedings is not clearly expressed in § 706 (k) and should not be inferred. We find these cases inapposite. Section 706 (k) does not "pre-empt" state law. "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 48–49. Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums. § 706 (f)(1). One aspect of complete relief is an

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[7] The Human Rights Law of the State of New York does not authorize an award of counsel fees for work done in either state administrative or judicial proceedings. See *State Commission for Human Rights* v. *Speer*, 35 App. Div. 2d 107, 111–112, 313 N. Y. S. 2d 28, 33 (1970), rev'd on other grounds, 29 N. Y. 2d 555, 272 N. E. 2d 884 (1971); *State Division of Human Rights* v. *Gorton*, 32 App. Div. 2d 933, 934, 302 N. Y. S. 2d 966, 968 (1969).

award of attorney's fees, which Congress considered necessary for the fulfillment of federal goals. Provision of a federal award of attorney's fees is not different from any other aspect of the ultimate authority of federal courts to enforce Title VII. For example, if state proceedings result in an injunction in favor of the complainant, but no award for backpay because state law does not authorize it, the complainant may proceed in federal court to "supplement" the state remedy. The state law which fails to authorize backpay has not been pre-empted. In any event, if it can be said that § 706 (k) pre-empts the state rule, we believe that Congress' intent to achieve this result is manifest.

We also find no merit in petitioners' suggestion that denial of a fee award was within the District Court's discretion. As noted earlier, the court's discretion to deny a fee award to a prevailing plaintiff is narrow. Absent "special circumstances," see *Newman* v. *Piggie Park Enterprises*, 390 U. S., at 402; *Christiansburg Garment Co.* v. *EEOC*, 434 U. S., at 416–417, fees should be awarded. Petitioners argue that the availability of a Division attorney to present the "case in support of the complaint" is a "special circumstance" which should deprive a prevailing complainant of a fee award. Clearly, however, an attorney is needed to assist the complainant during the state proceedings, and the Division employee does not take the place of private counsel.

The New York state procedure, to which respondent's charge was referred, provides for adversary quasi-judicial hearings leading to findings of fact, administrative appeals, and judicial review. The first stage of the state administrative action is the investigation; this results in either a finding of probable cause or a dismissal of the complaint. N. Y. Exec. Law § 297 (2) (McKinney Supp. 1979). A finding of probable cause after investigation is a necessary prelude to the public hearing. § 297 (4) (a). State law makes no provision for the participation of a Division attorney in the investigation, and a complainant is not represented by a Division attor-

ney at this preliminary stage. See Brief for New York State Attorney General and New York State Division of Human Rights as *Amici Curiae* 4–5.

Following the investigation, the Division attempts to conciliate the complainant's grievance with the employer. N. Y. Exec. Law §§ 297 (3)(a), (b), and (c) (McKinney 1972). No Division attorney participates in the conciliation efforts on behalf of the complainant, and the Division staff is even empowered to execute a settlement agreement with the employer over the complainant's objections. § 297 (3)(c).

If efforts at conciliation fail and a hearing is scheduled, state law provides:

> "The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney." § 297 (4)(a) (McKinney Supp. 1979).

At the time of the hearing on respondent's complaint, however, the practice of the Division was to involve one of its attorneys only if the complainant was not represented by private counsel. Brief for New York State Attorney General and New York State Division of Human Rights as *Amici Curiae* 5.[8] Complainants were "encouraged" to obtain private counsel due to a growing caseload and staff limitations. App. to Pet. for Cert. A58–A59.

At the appellate level, the Division attorney appears only to support and seek enforcement of orders issued by the Division and the Appeal Board. N. Y. Exec. Law § 298 (McKinney Supp. 1979). The Division attorney does not

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[8] On October 18, 1977, Division regulations were amended to provide for the presentation of the case in support of the complaint solely by the attorney for the complainant, upon consent of the Division. The regulation requires the Division attorney to submit a statement to the hearing examiner in lieu of appearance. 9 N. Y. C. R. R. § 465.11 (d)(2).

represent the complainant on an appeal from an order adverse to the claimant. In addition, the Division cannot appeal from an order of the Human Rights Appeal Board reversing a Division order. See Brief for New York State Attorney General and New York Division of Human Rights as *Amici Curiae* 5–6.

It is thus obvious that the assistance provided a complainant by the Division attorney is not fully adequate, and that the attorney has no obligation to the complainant as a client. In fact, at times the position of the Division may be detrimental to the interests of the complainant and to enforcement of federal rights. Representation by a private attorney thus assures development of a complete factual record at the investigative stage and at the administrative hearing. At both, settlement is possible and is encouraged. A Division employee cannot act as the complainant's attorney for purposes of advising him whether to accept a settlement. Retention of private counsel will help assure that federal rights are not compromised in the conciliation process.

If a Division attorney appears at the public hearing, he does not represent the interests of the complainant, but rather those of the State. *Id.*, at 5; App. to Pet. for Cert. A59–A60. He presents the "case in support of the complaint," not in support of the complainant. N. Y. Exec. Law § 297 (4)(a) (McKinney Supp. 1979). Upon appeal, the Division attorney is authorized only to support the order entered by the Division or the Appeal Board. Without doubt, the private attorney has an important role to play in preserving and protecting federal rights and interests during the state proceedings.[9]

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[9] We also reject petitioners' argument, not suggested in the petition for certiorari, that respondent's representation by a public interest group is a "special circumstance" that should result in denial of counsel fees. Federal Courts of Appeals' decisions are to the contrary. See, *e. g.*, *Reynolds* v. *Coomey*, 567 F. 2d 1166 (CA1 1978); *Torres* v. *Sachs*, 538 F. 2d 10, 13

In sum, we conclude that §§ 706 (f) and 706 (k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII. We also conclude that no special circumstances exist in this case that would justify denial of a fee award.

The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

THE CHIEF JUSTICE joins the Court's opinion except footnote 6 thereof; in his view, resolution of the issue dealt with in that footnote is not necessary.

MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST would reverse the judgment essentially for the reasons given by Judge Mulligan in dissenting from the judgment of the Court of Appeals.

MR. JUSTICE STEVENS, concurring in the judgment.

While I agree with most of what is said in the Court's opinion, it is useful to emphasize that this federal litigation was commenced in order to obtain relief for respondent on the merits of her basic dispute with petitioners, and not simply to recover attorney's fees. Whether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees, incurred in obtaining administrative relief in either a deferral or a nondeferral State is not only doubtful but is a question that is plainly not presented by this record.

(CA2 1976). Congress endorsed such decisions allowing fees to public interest groups when it was considering, and passed, the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988, which is legislation similar in purpose and design to Title VII's fee provision. See H. R. Rep. No. 94–1558, pp. 5 and 8, n. 16 (1976).

On July 13, 1977, when the EEOC issued respondent a letter notifying her that she had a right to file an action in federal court, and on September 30, 1977, when she commenced her federal-court action, state judicial review of the state administrative proceedings had not yet been completed. It was not until sometime in February 1978, after the federal judicial proceeding had been pending for several months, that all questions other than the fee issue were finally removed from the federal case. It is clear, therefore, that under the plain language of § 706 (k) of the Civil Rights Act of 1964, 78 Stat. 261, 42 U. S. C. § 2000e–5 (k),* the Federal District Court then had jurisdiction to allow the prevailing party to recover attorney's fees as a part of her costs.

A quite different question would be presented if, before any federal litigation were commenced, an aggrieved party had obtained complete relief in the administrative proceedings. It is by no means clear that the statute, which merely empowers a "court" to award fees, would authorize a fee allowance when there is no need for litigation in the federal court to resolve the merits of the underlying dispute. Indeed, it is not even clear that the EEOC has the authority to issue a "right to sue" letter, empowering the complainant to bring suit in federal court, after the complainant has obtained complete relief on the merits of his claim in administrative proceedings. See § 706 (f)(1) of the Civil Rights Act of 1964 as amended, 42 U. S. C. § 2000e-5 (f)(1). In any event, the facts of this case present no occasion for the Court's resolution of the issue, *ante*, at 66. All that needs to be decided is whether an allowance of fees may properly cover the work

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*That section provides in part:

"In any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ."

performed in the administrative proceedings that were a prerequisite to the court action. I agree with the Court's disposition of that issue, and would also observe that the same analysis would apply to work performed in appearing before the federal agency in a nondeferral State.

Accordingly, I concur in the judgment.

PRUNEYARD SHOPPING CENTER ET AL. *v.* ROBINS ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 79-289. Argued March 18, 1980—Decided June 9, 1980

Soon after appellees had begun soliciting in appellant privately owned shopping center's central courtyard for signatures from passersby for petitions in opposition to a United Nations resolution, a security guard informed appellees that they would have to leave because their activity violated shopping center regulations prohibiting any visitor or tenant from engaging in any publicly expressive activity that is not directly related to the center's commercial purposes. Appellees immediately left the premises and later filed suit in a California state court to enjoin the shopping center and its owner (also an appellant) from denying appellees access to the center for the purpose of circulating their petitions. The trial court held that appellees were not entitled under either the Federal or California Constitution to exercise their asserted rights on the shopping center property, and the California Court of Appeal affirmed. The California Supreme Court reversed, holding that the California Constitution protects speech and petitioning, reasonably exercised, in shopping centers even when the center is privately owned, and that such result does not infringe appellants' property rights protected by the Federal Constitution.

Held:

1. This case is properly before this Court as an appeal under 28 U. S. C. § 1257 (2). A state constitutional provision is a "statute" within the meaning of § 1257 (2), and in deciding that the State Constitution gave appellees the right to solicit signatures on appellants' property, the California Supreme Court rejected appellants' claim that recognition of such a right violated their "right to exclude others," a fundamental component of their federally protected property rights. Pp. 79–80.

2. State constitutional provisions, as construed to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, do not violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments. Pp. 80–88.

(a) The reasoning in *Lloyd Corp.* v. *Tanner*, 407 U. S. 551—which

held that the First Amendment does not prevent a private shopping center owner from prohibiting the distribution on center premises of handbills unrelated to the center's operations—does not *ex proprio vigore* limit a State's authority to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution. And a State, in the exercise of its police power, may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision. Pp. 80–81.

(b) The requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause of the Fifth Amendment, appellants having failed to demonstrate that the "right to exclude others" is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a "taking." *Kaiser Aetna* v. *United States*, 444 U. S. 164, distinguished. And there is no merit to appellants' argument that they have been denied property without due process of law, where they have failed to show that the due process test whereby the challenged law must not be unreasonable, arbitrary, or capricious and the means selected must have a real and substantial relation to the objective to be obtained, is not satisfied by the State's asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution. Pp. 82–85.

(c) Nor have appellants' First Amendment rights been infringed by the California Supreme Court's decision. The shopping center by choice of its owner is not limited to the personal use of appellants, and the views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Furthermore, no specific message is dictated by the State to be displayed on appellants' property, and appellants are free to publicly dissociate themselves from the views of the speakers or handbillers. *Wooley* v. *Maynard*, 430 U. S. 705; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, distinguished. Pp. 85–88.

23 Cal. 3d 899, 592 P. 2d 341, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and STEVENS, JJ., joined; in Parts I, II, III, and IV of which WHITE and POWELL, JJ., joined; and

in all but one sentence of which BLACKMUN, J., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 89. WHITE, J., filed an opinion concurring in part and in the judgment, *post*, p. 95. POWELL, J., filed an opinion concurring in part and in the judgment, in which WHITE, J., joined, *post*, p. 96. BLACKMUN, J., filed a statement concurring in part, *post*, p. 88.

Max L. Gillam argued the cause for appellants. With him on the briefs were *James W. Daniels, William C. Kelly, Jr.*, and *Thomas P. O'Donnell.*

Philip L. Hammer argued the cause and filed a brief for appellees.

Elinor Hadley Stillman argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General McCree* and *Deputy Solicitor General Wallace.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We postponed jurisdiction of this appeal from the Supreme Court of California to decide the important federal constitutional questions it presented. Those are whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's property rights under the Fifth

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*Briefs of *amici curiae* urging reversal were filed by *Laurence M. Cohen* and *Charles H. May II* for Homart Development Co.; by *Dean L. Overman* and *Peter N. Kyros, Jr.*, for the International Council of Shopping Centers; and by *Joseph H. Moless, Jr.*, and *Philip B. Kurland* for Taubman Co., Inc., et al.

Briefs of *amici curiae* urging affirmance were filed by *Susan L. Paulus, Amitai Schwartz*, and *Burt Neuborne* for the American Civil Liberties Union of Northern California et al.; by *J. Albert Woll, Laurence Gold*, and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations; by *Nathan Z. Dershowitz* for the American Jewish Congress et al.; and by *Roger Jon Diamond* for People's Lobby, Inc.

and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments.

I

Appellant PruneYard is a privately owned shopping center in the city of Campbell, Cal. It covers approximately 21 acres—5 devoted to parking and 16 occupied by walkways, plazas, sidewalks, and buildings that contain more than 65 specialty shops, 10 restaurants, and a movie theater. The PruneYard is open to the public for the purpose of encouraging the patronizing of its commercial establishments. It has a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes. This policy has been strictly enforced in a nondiscriminatory fashion. The PruneYard is owned by appellant Fred Sahadi.

Appellees are high school students who sought to solicit support for their opposition to a United Nations resolution against "Zionism." On a Saturday afternoon they set up a card table in a corner of PruneYard's central courtyard. They distributed pamphlets and asked passersby to sign petitions, which were to be sent to the President and Members of Congress. Their activity was peaceful and orderly and so far as the record indicates was not objected to by PruneYard's patrons.

Soon after appellees had begun soliciting signatures, a security guard informed them that they would have to leave because their activity violated PruneYard regulations. The guard suggested that they move to the public sidewalk at the PruneYard's perimeter. Appellees immediately left the premises and later filed this lawsuit in the California Superior Court of Santa Clara County. They sought to enjoin appellants from denying them access to the PruneYard for the purpose of circulating their petitions.

The Superior Court held that appellees were not entitled under either the Federal or California Constitution to exercise

their asserted rights on the shopping center property. App. to Juris. Statement A–2. It concluded that there were "adequate, effective channels of communication for [appellees] other than soliciting on the private property of the [PruneYard]." *Id.*, at A–3. The California Court of Appeal affirmed.

The California Supreme Court reversed, holding that the California Constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." 23 Cal. 3d 899, 910, 592 P. 2d 341, 347 (1979). It concluded that appellees were entitled to conduct their activity on PruneYard property. In rejecting appellants' contention that such a result infringed property rights protected by the Federal Constitution, the California Supreme Court observed:

> " 'It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center there]. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations (see *Diamond* [v. *Bland*, 3 Cal. 3d 653, 665, 477 P. 2d 733, 741 (1970)]) would not markedly dilute defendant's property rights.' ([*Diamond* v. *Bland*, 11 Cal. 3d 331, 345, 521 P. 2d 460, 470 (1974)] (dis. opn. of Mosk, J.).)" *Id.*, at 910–911, 592 P. 2d, at 347–348.

The California Supreme Court thus expressly overruled its earlier decision in *Diamond* v. *Bland*, 11 Cal. 3d 331, 521 P. 2d 460 (*Diamond II*), cert. denied, 419 U. S. 885 (1974), which had reached an opposite conclusion. 23 Cal. 3d, at

910, 592 P. 2d, at 347.[1] Before this Court, appellants contend that their constitutionally established rights under the Fourteenth Amendment to exclude appellees from adverse use of appellants' private property cannot be denied by invocation of a state constitutional provision or by judicial reconstruction of a State's laws of private property. We postponed consideration of the question of jurisdiction until the hearing of the case on the merits. 444 U. S. 949. We now affirm.

II

We initially conclude that this case is properly before us as an appeal under 28 U. S. C. § 1257 (2). It has long been established that a state constitutional provision is a "statute" within the meaning of § 1257 (2). See, *e. g., Torcaso* v. *Watkins,* 367 U. S. 488, 489 (1961); *Adamson* v. *California,* 332 U. S. 46, 48, n. 2 (1947); *Railway Express Agency, Inc.* v. *Virginia,* 282 U. S. 440 (1931). Here the California Supreme Court decided that Art. 1, §§ 2 and 3, of the California Constitution gave appellees the right to solicit signatures on appellants' property in exercising their state rights of free expression and petition.[2] In so doing, the California Supreme Court

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[1] The California Supreme Court in *Diamond II* had reasoned:

"In this case, as in *Lloyd* [*Corp.* v. *Tanner,* 407 U. S. 551 (1972)], plaintiffs have alternative, effective channels of communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in which such persons reside. Unlike the situation in *Marsh* [v. *Alabama,* 326 U. S. 501 (1946)] and [*Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968)], no reason appears why such alternative means of communication would be ineffective, and plaintiffs concede that, unlike *Logan,* their initiative petition bears no particular relation to the shopping center, its individual stores or patrons." 11 Cal. 3d, at 335, 521 P. 2d, at 463.

Diamond II thus held that the shopping center owner's property rights outweighed the rights of free expression and petition asserted by the plaintiffs. *Ibid.*

[2] Article 1, § 2, of the California Constitution provides:

"Every person may freely speak, write and publish his or her sentiments

rejected appellants' claim that recognition of such a right violated appellants' "right to exclude others," which is a fundamental component of their federally protected property rights. Appeal is thus the proper method of review.

III

Appellants first contend that *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), prevents the State from requiring a private shopping center owner to provide access to persons exercising their state constitutional rights of free speech and petition when adequate alternative avenues of communication are available. *Lloyd* dealt with the question whether under the Federal Constitution a privately owned shopping center may prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. *Id.*, at 552. The shopping center had adopted a strict policy against the distribution of handbills within the building complex and its malls, and it made no exceptions to this rule. *Id.*, at 555.[3] Respondents in *Lloyd* argued that because the shopping center was open to the public, the First Amendment prevents the private owner from enforcing the handbilling restriction on shopping center premises. *Id.*, at 564.[4]

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on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Article 1, § 3, of the California Constitution provides:

"[P]eople have the right to . . . petition government for redress of grievances."

[3] The center had banned handbilling because it "was considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved." 407 U. S., at 555–556.

[4] Respondents relied on *Marsh* v. *Alabama*, 326 U. S. 501 (1946), and *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), in support of their claim that the shopping center's permission to the public to enter its property for the purpose of shopping caused its property to lose its private character, thereby permitting members of the public to exercise

In rejecting this claim we substantially repudiated the rationale of *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), which was later overruled in *Hudgens* v. *NLRB*, 424 U. S. 507 (1976). We stated that property does not "lose its private character merely because the public is generally invited to use it for designated purposes," and that "[t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." 407 U. S., at 569.

Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. *Cooper* v. *California*, 386 U. S. 58, 62 (1967). See also 407 U. S., at 569–570. In *Lloyd*, *supra*, there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found to exist by the California Supreme Court here. It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision. See, *e. g.*, *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976). *Lloyd* held that when a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in expression beyond those already existing under applicable law. See also *Hudgens* v. *NLRB*, *supra*, at 517–521.

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the same free speech rights as they would have on similar public facilities or the streets of a city or town. Both of those cases, however, involved no state law authorizing the conduct of the solicitors or handbillers.

IV

Appellants next contend that a right to exclude others underlies the Fifth Amendment guarantee against the taking of property without just compensation and the Fourteenth Amendment guarantee against the deprivation of property without due process of law.[5]

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. *Kaiser Aetna* v. *United States*, 444 U. S. 164, 179–180 (1979). And here there has literally been a "taking" of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property.[6] But it is well established that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong* v. *United States*, 364 U. S. 40, 48 (1960). Rather, the determination whether a state law unlawfully infringes a landowner's property in

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[5] Appellants do not maintain that this is a condemnation case. Reply Brief for Appellants 2. Rather, they argue that "[t]he rights of a property owner . . . are rooted in the Fifth Amendment guarantee against the taking of property without just compensation and are incorporated in the Fourteenth Amendment guarantee against the deprivation of property without due process of law." Brief for Appellants 10. Here, of course, if the law required the conclusion that there was a "taking," there was concededly no compensation, just or otherwise, paid to appellants. This argument falls within appellants' contention that *Lloyd* is controlling, see 407 U. S., at 567, and was adequately presented below. See *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928).

[6] The term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945). It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.*, at 377–378.

violation of the Taking Clause requires an examination of whether the restriction on private property "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*, at 49.[7] This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. *Kaiser Aetna* v. *United States, supra,* at 175. When "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 415 (1922).

Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions. Appellees were orderly, and they limited their activity to the

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[7] Thus, as this Court stated in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 325 (1893), a case which has since been characterized as resting primarily on "estoppel," see, *e. g., United States* v. *Rands,* 389 U. S. 121, 126 (1967), the Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." See also *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104, 123–125 (1978); *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 416 (1922).

common areas of the shopping center. In these circumstances, the fact that they may have "physically invaded" appellants' property cannot be viewed as determinative.

This case is quite different from *Kaiser Aetna* v. *United States, supra*. *Kaiser Aetna* was a case in which the owners of a private pond had invested substantial amounts of money in dredging the pond, developing it into an exclusive marina, and building a surrounding marina community. The marina was open only to fee-paying members, and the fees were paid in part to "maintain the privacy and security of the pond." *Id.*, at 168. The Federal Government sought to compel free public use of the private marina on the ground that the marina became subject to the federal navigational servitude because the owners had dredged a channel connecting it to "navigable water."

The Government's attempt to create a public right of access to the improved pond interfered with Kaiser Aetna's "reasonable investment backed expectations." We held that it went "so far beyond ordinary regulation or improvement for navigation as to amount to a taking. . . ." *Id.*, at 178. Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define "property" in the first instance. A State is, of course, bound by the Just Compensation Clause of the Fifth Amendment, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 233, 236–237 (1897), but here appellants have failed to demonstrate that the "right to exclude others" is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a "taking."

There is also little merit to appellants' argument that they have been denied their property without due process of law. In *Nebbia* v. *New York*, 291 U. S. 502 (1934), this Court stated:

> "[N]either property rights nor contract rights are absolute. . . . Equally fundamental with the private right

is that of the public to regulate it in the common interest. . . .

. . . . . .

". . . [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained." *Id.*, at 523, 525.

See also *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106 (1949); *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 124–125 (1978). Appellants have failed to provide sufficient justification for concluding that this test is not satisfied by the State's asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution.[8]

V

Appellants finally contend that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.[9] They

[8] Although appellants contend there are adequate alternative avenues of communication available for appellees, it does not violate the United States Constitution for the State Supreme Court to conclude that access to appellants' property in the manner required here is necessary to the promotion of state-protected rights of free speech and petition.

[9] Appellees contend that this issue is not properly before us because appellants have not met their burden of showing that it was raised in the state courts. It is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, "[n]o particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S., at 67.

Before the Supreme Court of California, appellants argued:

"The constitutional right to exclude potential communicants from private property is inextricably intertwined with the right of the property owner

state that in *Wooley* v. *Maynard*, 430 U. S. 705 (1977), this Court concluded that a State may not constitutionally require an individual to participate in the dissemination of an ideologi-

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to select the way he wishes to use his property. . . . The right, which has been recognized as deriving from the owner's status as owner, also derives from the owner's status as himself a potential communicant. Defendant urges that his constitutional right to free speech would be infringed if he were required to make his property available to others for the purpose of their expressive activity." Brief in Response to *Amici Curiae* Briefs in No. S. F. 23812, p. 39 (Sup. Ct. Cal.).

In making this argument appellants explicitly relied on *Wooley* v. *Maynard*, 430 U. S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). Brief in Response to *Amici Curiae* Briefs, *supra*, at 40–42. Before this Court appellants contend that "[t]he constitutional rights of private property owners also have their origins in the First Amendment right of the property owner not to be forced by the state to use his property as a forum for the speech of others." Brief for Appellants 12. See also Juris. Statement 12. And appellants throughout this litigation have been asserting their federal constitutional right to prohibit public expressive activity on their property that is not directly related to PruneYard's commercial purposes.

In addition, this Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 677–678 (1930); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 320 (1930); *Saunders* v. *Shaw*, 244 U. S. 317, 320 (1917). Here prior to its decision below, the California Supreme Court had expressly decided to follow *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), in defining the scope of state constitutional rights of free speech and petition. *Diamond II*, 11 Cal. 3d, at 335, 521 P. 2d, at 463. It was not until the instant case that the California Supreme Court overruled *Diamond II*, *supra*, and held that the California Constitution can and does require shopping center owners to grant access to individuals exercising their state rights of free expression and petition.

Prior to reaching the California Supreme Court, appellants argued that the *Diamond II* decision bound the California Superior Court and Court of Appeal to rule in appellants' favor. Appellants prevailed in these courts, and *Diamond II* was held to be controlling. Once before the California Supreme Court, as noted above, appellants explicitly presented

cal message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. This rationale applies here, they argue, because the message of *Wooley* is that the State may not force an individual to display any message at all.

Wooley, however, was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used "as part of his daily life," and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest. Here, by contrast, there are a number of distinguishing factors. Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

Appellants also argue that their First Amendment rights have been infringed in light of *West Virginia State Board of*

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their federal constitutional right to prohibit public expression on their property in terms of *Wooley* and *Barnette*. It was not until that time that they could have reasonably expected that the validity of the earlier *Diamond II* decision would be questioned. In these circumstances we conclude that appellants have adequately raised the federal question.

Education v. *Barnette*, 319 U. S. 624 (1943), and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974). *Barnette* is inapposite because it involved the compelled recitation of a message containing an affirmation of belief. This Court held such compulsion unconstitutional because it "require[d] the individual to communicate by word and sign his acceptance" of government-dictated political ideas, whether or not he subscribed to them. 319 U. S., at 633. Appellants are not similarly being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views of the speakers or handbillers.

Tornillo struck down a Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. It rests on the principle that the State cannot tell a newspaper what it must print. The Florida statute contravened this principle in that it "exact[ed] a penalty on the basis of the content of a newspaper." 418 U. S., at 256. There also was a danger in *Tornillo* that the statute would "dampe[n] the vigor and limi[t] the variety of public debate" by deterring editors from publishing controversial political statements that might trigger the application of the statute. *Id.*, at 257. Thus, the statute was found to be an "intrusion into the function of editors." *Id.*, at 258. These concerns obviously are not present here.

We conclude that neither appellants' federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state-protected rights of expression and petition on appellants' property. The judgment of the Supreme Court of California is therefore

Affirmed.

MR. JUSTICE BLACKMUN joins the opinion of the Court except that sentence thereof, *ante*, at 84, which reads: "Nor

as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance."

MR. JUSTICE MARSHALL, concurring.

I join the opinion of the Court, but write separately to make a few additional points.

I

In *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), this Court held that the First and Fourteenth Amendments prevented a state court from relying on its law of trespass to enjoin the peaceful picketing of a business enterprise located within a shopping center. The Court concluded that because the shopping center "serves as the community business block" and is open to the general public, "the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises." *Id.*, at 319. The Court rejected the suggestion that such an abrogation of the state law of trespass would intrude on the constitutionally protected property rights of shopping center owners. And it emphasized that the shopping center was open to the public and that reasonable restrictions on the exercise of communicative activity would be permitted. "[N]o meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue." *Id.*, at 324.

The Court in *Logan Valley* emphasized that if the property rights of shopping center owners were permitted to overcome the First Amendment rights of prospective petitioners, a significant intrusion on communicative activity would result. Because "[t]he large-scale movement of this country's population from the cities to the suburbs has been accompanied

by the advent of the suburban shopping center," a contrary decision would have "substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies." *Ibid.* In light of these realities, we concluded that the First and Fourteenth Amendments prohibited the State from using its trespass laws to prevent the exercise of expressive activities on privately owned shopping centers, at least when those activities were related to the operations of the store at which they were directed.

In *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), the Court confined *Logan Valley* to its facts, holding that the First and Fourteenth Amendments were not violated when a State prohibited petitioning that was not designed to convey information with respect to the operation of the store that was being picketed. The Court indicated that a contrary result would constitute "an unwarranted infringement of property rights." 407 U. S., at 567. And in *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), the Court concluded that *Lloyd* had in fact overruled *Logan Valley*.

I continue to believe that *Logan Valley* was rightly decided, and that both *Lloyd* and *Hudgens* were incorrect interpretations of the First and Fourteenth Amendments. State action was present in all three cases. In all of them the shopping center owners had opened their centers to the public at large, effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and parks. The State had in turn made its laws of trespass available to shopping center owners, enabling them to exclude those who wished to engage in expressive activity on their premises.[1]

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[1] In this respect the cases resembled *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), and *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), in which the common-law rules of contract and tort were held to constitute state action for Fourteenth Amendment purposes.

Rights of free expression become illusory when a State has operated in such a way as to shut off effective channels of communication. I continue to believe, then, that "the Court's rejection of any role for the First Amendment in the privately owned shopping center complex stems . . . from an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment's guarantee of freedom of speech." *Hudgens* v. *NLRB*, *supra*, at 542 (dissenting opinion).

II

In the litigation now before the Court, the Supreme Court of California construed the California Constitution to protect precisely those rights of communication and expression that were at stake in *Logan Valley*, *Lloyd*, and *Hudgens*. The California court concluded that its State "[C]onstitution broadly proclaims speech and petition rights. Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights." 23 Cal. 3d 899, 910, 592 P. 2d 341, 347 (1979). Like the Court in *Logan Valley*, the California court found that access to shopping centers was crucial to the exercise of rights of free expression. And like the Court in *Logan Valley*, the California court rejected the suggestion that the Fourteenth Amendment barred the intrusion on the property rights of the shopping center owners. I applaud the court's decision, which is a part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution. See Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

Appellants, of course, take a different view. They contend that the decision below amounts to a constitutional "taking" or a deprivation of their property without due process of law. *Lloyd*, they claim, did not merely overrule *Logan*

Valley's First Amendment holding; it overruled its due process ruling as well, recognizing a federally protected right on the part of shopping center owners to enforce the pre-existing state law of trespass by excluding those who engage in communicative activity on their property. In my view, the issue appellants present is largely a restatement of the question of whether and to what extent a State may abrogate or modify common-law rights. Although the cases in this Court do not definitively resolve the question, they demonstrate that appellants' claim has no merit.

Earlier this Term, in *Martinez* v. *California*, 444 U. S. 277 (1980), the Court was also confronted with a claim that the abolition of a cause of action previously conferred by state law was an impermissible taking of "property." We responded that even if a pre-existing state-law remedy "is a species of 'property' protected by the Due Process Clause . . . , it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Id.*, at 281–282. Similarly, in the context of a claim that a guest statute impermissibly abrogated common-law rights of tort, the Court observed that the Due Process Clause does not forbid the "creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver* v. *Silver*, 280 U. S. 117, 122 (1929). And in *Munn* v. *Illinois*, 94 U. S. 113 (1877), the Court upheld a statute limiting the permissible rate for the warehousing of grain. "A person has no property, no vested interest, in any rule of the common law. . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the

common law as they are developed, and to adapt it to the changes of time and circumstances." *Id.*, at 134. See also *Second Employers' Liability Cases*, 223 U. S. 1, 50 (1912); *Crowell* v. *Benson*, 285 U. S. 22, 41 (1932).

Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State, notwithstanding the California Supreme Court's finding that state-created rights of expressive activity would be severely hindered if shopping centers were closed to expressive activities by members of the public. If accepted, that claim would represent a return to the era of *Lochner* v. *New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result.

On the other hand, I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.[2] Quite serious constitutional questions might be raised if a legislature attempted to abolish certain

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[2] This understanding is embodied in cases in the procedural due process area holding that at least some "grievous losses" amount to deprivation of "liberty" or "property" within the meaning of the Due Process Clause, even if those losses are not protected by statutory or common law. See *Vitek* v. *Jones*, 445 U. S. 480, 488–489 (1980), and cases cited; *Mathews* v. *Eldridge*, 424 U. S. 319, 333 (1976). See also *Meachum* v. *Fano*, 427 U. S. 215, 229 (1976) (STEVENS, J., dissenting).

categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[3]

That "core" has not been approached in this case. The California Supreme Court's decision is limited to shopping centers, which are already open to the general public. The owners are permitted to impose reasonable restrictions on expressive activity. There has been no showing of interference with appellants' normal business operations. The California court has not permitted an invasion of any personal sanctuary. Cf. *Stanley* v. *Georgia*, 394 U. S. 557 (1969). No rights of privacy are implicated. In these circumstances

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[3] For example, in *Ingraham* v. *Wright*, 430 U. S. 651 (1977), the Court found a constitutional liberty interest in freedom from corporal punishment, in large part on the ground that that interest was protected at common law. The Court stated that the "Due Process Clause . . . was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Id.*, at 672–673 (citation omitted). In *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59, 88 (1978), the Court reserved the question whether in creating a compensation scheme for victims of nuclear accidents, Congress was constitutionally obliged to "provide a reasonable substitute remedy" for the abrogation of common-law rights of tort. Similarly, in *New York Central R. Co.* v. *White*, 243 U. S. 188, 201 (1917), the Court expressed uncertainty as to whether "a State might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute," and "doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead."

there is no basis for strictly scrutinizing the intrusion authorized by the California Supreme Court.

I join the opinion of the Court.

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

I join MR. JUSTICE POWELL's concurring opinion but with these additional remarks.

The question here is whether the Federal Constitution forbids a State to implement its own free-speech guarantee by requiring owners of shopping centers to permit entry on their property for the purpose of communicating with the public about subjects having no connection with the shopping centers' business. The Supreme Court of California held that in the circumstances of this case the federally protected property rights of appellants were not infringed. The state court recognized, however, that reasonable time and place limitations could be imposed and that it was dealing with the public or common areas in a large shopping center and not with an individual retail establishment within or without the shopping center or with the property or privacy rights of a homeowner. On the facts before it, "[a] handful of additional orderly persons soliciting signatures and distributing handbills . . . would not markedly dilute defendant's property rights." 23 Cal. 3d 899, 911, 592 P. 2d 341, 347–348 (1979).

I agree that on the record before us there was not an unconstitutional infringement of appellants' property rights. But it bears pointing out that the Federal Constitution does not require that a shopping center permit distributions or solicitations on its property. Indeed, *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), and *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), hold that the First and Fourteenth Amendments do not prevent the property owner from excluding those who would demonstrate or communicate on his property. Insofar as the Federal Constitution is concerned, therefore, a State may

decline to construe its own constitution so as to limit the property rights of the shopping center owner.

The Court also affirms the California Supreme Court's implicit holding that appellants' own free-speech rights under the First and Fourteenth Amendments were not infringed by requiring them to provide a forum for appellees to communicate with the public on shopping center property. I concur in this judgment, but I agree with MR. JUSTICE POWELL that there are other circumstances that would present a far different First Amendment issue. May a State require the owner of a shopping center to subsidize any and all political, religious, or social-action groups by furnishing a convenient place for them to urge their views on the public and to solicit funds from likely prospects? Surely there are some limits on state authority to impose such requirements; and in this respect, I am not in entire accord with Part V of the Court's opinion.

MR. JUSTICE POWELL, with whom MR. JUSTICE WHITE joins, concurring in part and in the judgment.

Although I join the judgment, I do not agree with all of the reasoning in Part V of the Court's opinion. I join Parts I–IV on the understanding that our decision is limited to the type of shopping center involved in this case. Significantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises. Nor does our decision today apply to all "shopping centers." This generic term may include retail establishments that vary widely in size, location, and other relevant characteristics. Even large establishments may be able to show that the number or type of persons wishing to speak on their premises would create a substantial annoyance to customers that could be eliminated only by elaborate, expensive, and possibly unenforceable time, place, and manner restrictions. As the Court observes, state power to regulate private property is limited to the adoption of reasonable restrictions that "do not amount to a taking without

just compensation or contravene any other federal constitutional provision." *Ante*, at 81.

I

Restrictions on property use, like other state laws, are invalid if they infringe the freedom of expression and belief protected by the First and Fourteenth Amendments. In Part V of today's opinion, the Court rejects appellants' contention that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *Ante*, at 85. I agree that the owner of this shopping center has failed to establish a cognizable First Amendment claim in this case. But some of the language in the Court's opinion is unnecessarily and perhaps confusingly broad. In my view, state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions.

The State may not compel a person to affirm a belief he does not hold. See *Wooley* v. *Maynard*, 430 U. S. 705 (1977); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). Whatever the full sweep of this principle, I do not believe that the result in *Wooley* v. *Maynard*, *supra*, would have changed had the State of New Hampshire directed its citizens to place the slogan "Live Free or Die" in their shop windows rather than on their automobiles. In that case, we said that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." 430 U. S., at 714. This principle on its face protects a person who refuses to allow use of his property as a marketplace for the ideas of others. And I can find no reason to exclude the owner whose property is "not limited to [his] personal use. . . ." *Ante*, at 87. A person who has merely invited the public onto his property for commercial purposes cannot fairly be said to have relinquished his right to decline "to be

an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley* v. *Maynard, supra,* at 715.[1]

As the Court observes, this case involves only a state-created right of limited access to a specialized type of property. *Ante,* at 87, 87–88. But even when no particular message is mandated by the State, First Amendment interests are affected by state action that forces a property owner to admit third-party speakers. In many situations, a right of access is no less intrusive than speech compelled by the State itself. For example, a law requiring that a newspaper permit others to use its columns imposes an unacceptable burden upon the newspaper's First Amendment right to select material for publication. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974). See also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 117 (1973) (plurality opinion). Such a right of access burdens the newspaper's "fundamental right to decide what to print or omit." *Wooley* v. *Maynard, supra,* at 714; see *Miami Herald Publishing Co.* v. *Tornillo, supra,* at 257. As such, it is tantamount to compelled affirmation and, thus, presumptively unconstitutional.[2]

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[1] Cf. *Lloyd Corp.* v. *Tanner,* 407 U. S. 551, 569 (1972) ("property [does not] lose its private character merely because the public is generally invited to use it for designated purposes").

[2] Even if a person's own speech is not affected by a right of access to his property, a requirement that he lend support to the expression of a third party's views may burden impermissibly the freedoms of association and belief protected by the First and Fourteenth Amendments. In *Abood* v. *Detroit Board of Education,* 431 U. S. 209, 235 (1977), we held that a State may not require a person "to contribute to the support of an ideological cause he may oppose. . . ." To require a landowner to supply a forum for causes he finds objectionable also might be an unacceptable "compelled subsidization" in some circumstances. *Id.,* at 237; cf. *Central Hardware Co.* v. *NLRB,* 407 U. S. 539, 543–545 (1972) ("property rights" may permit exclusion of union organizers); *NLRB* v. *Babcock & Wilcox Co.,* 351 U. S. 105, 112 (1956) (same). See generally *Eastex, Inc.* v. *NLRB,* 437 U. S. 556, 571–576 (1978); *Hudgens* v. *NLRB,*

The selection of material for publication is not generally a concern of shopping centers. But similar speech interests are affected when listeners are likely to identify opinions expressed by members of the public on commercial property as the views of the owner. If a state law mandated public access to the bulletin board of a freestanding store, hotel, office, or small shopping center, customers might well conclude that the messages reflect the view of the proprietor. The same would be true if the public were allowed to solicit or distribute pamphlets in the entrance area of a store or in the lobby of a private building. The property owner or proprietor would be faced with a choice: he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he has been forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues. The mere fact that he is free to dissociate himself from the views expressed on his property, see *ante*, at 87, cannot restore his "right to refrain from speaking at all." *Wooley* v. *Maynard*, *supra*, at 714.

A property owner also may be faced with speakers who wish to use his premises as a platform for views that he finds morally repugnant. Numerous examples come to mind. A minority-owned business confronted with leaflet distributers from the American Nazi Party or the Ku Klux Klan, a church-operated enterprise asked to host demonstrations in favor of abortion, or a union compelled to supply a forum to right-to-work advocates could be placed in an intolerable position if state law requires it to make its private property available to anyone who wishes to speak. The strong emotions evoked by speech

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424 U. S. 507, 521–522 (1976). The appellants do not argue, however, that *Abood* supports the claimed right to exclude speakers from their property. Nor have they alleged that they disagree with the messages at issue in this case. See *infra*, at 101.

in such situations may virtually compel the proprietor to respond.

The pressure to respond is particularly apparent when the owner has taken a position opposed to the view being expressed on his property. But an owner who strongly objects to some of the causes to which the state-imposed right of access would extend may oppose ideological activities "of *any* sort" that are not related to the purposes for which he has invited the public onto his property. See *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 213, 241 (1977). To require the owner to specify the particular ideas he finds objectionable enough to compel a response would force him to relinquish his "freedom to maintain his own beliefs without public disclosure." *Ibid.*[3] Thus, the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner.[4]

II

One easily can identify other circumstances in which a right of access to commercial property would burden the owner's First and Fourteenth Amendment right to refrain from

[3] The problem is compounded where, as in shopping centers or in the lobby areas of hotels and office buildings, stores are leased to different proprietors with divergent views.

[4] In a proper case, the property owner also may be protected by the principle that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Stanley* v. *Georgia*, 394 U. S. 557, 565 (1969). Observing that a State has no interest in controlling the moral content of a person's thoughts, *ibid.*, the Court in *Stanley* invalidated a law imposing criminal penalties for the private possession of obscenity. *Stanley* prevents a State from removing from the home expressive materials that a person may wish to peruse privately. The same principle may extend to state action that forces individual exposure to third-party messages. Thus, a law that required homeowners to permit speakers to congregate on their front lawns would be a massive and possibly unconstitutional intrusion into personal privacy and freedom of belief. No such problem arises in this case.

speaking. But appellants have identified no such circumstance. Nor did appellants introduce evidence that would support a holding in their favor under either of the legal theories outlined above.

On the record before us, I cannot say that customers of this vast center would be likely to assume that appellees' limited speech activity expressed the views of the PruneYard or of its owner. The shopping center occupies several city blocks. It contains more than 65 shops, 10 restaurants, and a theater. Interspersed among these establishments are common walkways and plazas designed to attract the public. See *ante*, at 77, 83. Appellees are high school students who set up their card table in one corner of a central courtyard known as the "Grand Plaza." App. to Juris. Statement B–2. They showed passersby several petitions and solicited signatures. Persons solicited could not reasonably have believed that the petitions embodied the views of the shopping center merely because it owned the ground on which they stood.

Appellants have not alleged that they object to the ideas contained in the appellees' petitions. Nor do they assert that some groups who reasonably might be expected to speak at the PruneYard will express views that are so objectionable as to require a response even when listeners will not mistake their source. The record contains no evidence concerning the numbers or types of interest groups that may seek access to this shopping center, and no testimony showing that the appellants strongly disagree with any of them.

Because appellants have not shown that the limited right of access held to be afforded by the California Constitution burdened their First and Fourteenth Amendment rights in the circumstances presented, I join the judgment of the Court. I do not interpret our decision today as a blanket approval for state efforts to transform privately owned commercial property into public forums. Any such state action would raise substantial federal constitutional questions not present in this case.

CONSUMER PRODUCT SAFETY COMMISSION ET AL. *v.* GTE SYLVANIA, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-521. Argued April 14, 1980—Decided June 9, 1980

Section 6 (b)(1) of the Consumer Product Safety Act (CPSA) requires that, at least 30 days prior to the "public disclosure of any information" pertaining to a consumer product obtained by the Consumer Product Safety Commission (Commission) pursuant to its information-gathering authority, the Commission must notify the manufacturer and provide it with a summary of the information to be disclosed, if the product is to be designated or described in such a way as to permit the public to ascertain readily the manufacturer's identity; that the manufacturer be given a reasonable opportunity to submit comments regarding the information; and that the Commission "take reasonable steps to assure" that such information is "accurate" and that disclosure is "fair in the circumstances and reasonably related to effectuating the purposes" of the CPSA. In the instant case, the Commission, upon receiving Freedom of Information Act (FOIA) requests and without complying with § 6 (b)(1), decided to release certain accident reports that it had obtained from respondent manufacturers and that were accompanied, for the most part, by claims of confidentiality. The District Court permanently enjoined the Commission from disclosing the materials, rejecting its contention that § 6 (b)(1) applies only when the Commission affirmatively undertakes to disclose information to the public but not when it merely complies with a request for information under the FOIA. The Court of Appeals affirmed.

Held: Section 6 (b)(1) governs the disclosure of records by the Commission pursuant to a request under the FOIA. Pp. 108-124.

(a) Nothing in § 6 (b)(1)'s language, or in any other provision of the CPSA, supports the claim that § 6 (b)(1) is limited to disclosures initiated by the Commission, a disclosure pursuant to the FOIA being accurately characterized as a "public disclosure" within the plain meaning of § 6 (b)(1). Moreover, § 6 (b)(2), which contains specific exceptions to § 6 (b)(1)'s requirements, does not include the disclosure of information in response to an FOIA request. And § 25 (c) of the CPSA—designating certain reports as "public information" notwithstanding that they might be exempted from disclosure under the FOIA

and thus within the scope of § 6 (a) (1), which incorporates by reference the exemptions of the FOIA—specifically makes the disclosure of the information subject to the limitations of § 6 (b) whether it be "affirmatively" released by the Commission or released pursuant to an FOIA request. Pp. 108–110.

(b) Neither the legislative history of the CPSA prior to its enactment nor subsequent legislative and administrative interpretations of § 6 (b) (1) warrant construing § 6 (b) (1) as being limited to the Commission's "affirmative" disclosures. Pp. 110–120.

(c) Applicability of § 6 (b) (1) to FOIA requests is not precluded on the alleged ground that the Commission would be unable to comply with FOIA time requirements for handling disclosure requests and administrative appeals from refusals to disclose. Such an argument assumes that the Commission must comply with FOIA time limitations, but its Exemption 3 states that the FOIA does not apply to matters that are specifically exempted from disclosure by another statute which requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or which establishes particular criteria for withholding or refers to particular types of matters to be withheld. Here, § 6 (b) (1) sets forth sufficiently definite standards to fall within the scope of Exemption 3. Pp. 121–123.

(d) The argument that requiring the Commission to comply with § 6 (b) (1) in meeting FOIA requests will impose insurmountable burdens on the agency is entirely speculative. Moreover, any increased burdens imposed on the Commission were intended by Congress in striking an appropriate balance between the interests of consumers and the need for fairness and accuracy with respect to information disclosed by the Commission and thus the claim of undue burdens is properly addressed to Congress, not this Court. Pp. 123–124.

598 F. 2d 790, affirmed.

REHNQUIST, J., delivered the opinion for a unanimous Court.

Peter Buscemi argued the cause *pro hac vice* for petitioners. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Daniel, Deputy Solicitor General Geller, Leonard Schaitman, Mark N. Mutterperl,* and *Andrew S. Krulwich.*

Bernard G. Segal argued the cause for respondents. With him on the brief were *Charles C. Hileman III, Ira P. Tiger,*

Deena Jo Schneider, Robert W. Steele, Alan M. Grimaldi, Harry L. Shniderman, H. James Conaway, Jr., Januar D. Bove, Jr., Stephen B. Clarkson, Charles S. Crompton, Jr., Ira M. Millstein, Peter Gartland, David Fleischer, Burton Y. Weitzenfeld, Michael A. Stiegel, William F. Patten, and *H. Woodruff Turner.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether § 6 (b)(1) of the Consumer Product Safety Act, 15 U. S. C. § 2055 (b)(1), governs the disclosure of records by the Consumer Product Safety Commission pursuant to a request under the Freedom of Information Act. We granted certiorari to review a judgment of the Court of Appeals for the Third Circuit because of the importance of the question and because of a conflict in the Circuits.[1] 444 U. S. 979.

I

In 1972, Congress enacted the Consumer Product Safety Act (CPSA), 86 Stat. 1207, 15 U. S. C. § 2051 *et seq.*, in order, *inter alia*, "to protect the public against unreasonable risks of injury associated with consumer products" and "to assist consumers in evaluating the comparative safety of consumer products." 15 U. S. C. §§ 2051 (b)(1) and (2). The CPSA created the Consumer Product Safety Commission (Commission) to carry out the statutory purposes. 15 U. S. C. § 2053. The Commission's powers include the authority to collect and disseminate product safety information, 15 U. S. C. § 2054 (a)(1), to conduct research and tests on consumer products, 15 U. S. C. §§ 2054 (b)(1) and (2), to promulgate safety standards, 15 U. S. C. § 2056, and to ban hazardous products, 15 U. S. C. § 2057.

**Richard A. Lowe* filed a brief for the Consumer Federation of America as *amicus curiae* urging reversal.

[1] The decision below, 598 F. 2d 790 (1979), is in direct conflict with *Pierce & Stevens Chemical Corp.* v. *U. S. Consumer Product Safety Comm'n*, 585 F. 2d 1382 (CA2 1978).

Section 6 of the CPSA, 86 Stat. 1212, 15 U. S. C. § 2055, regulates the "public disclosure" of information by the Commission. Section 6 (b)(1), with which we deal here, requires the Commission, at least 30 days before the public disclosure of information pertaining to a consumer product, to notify the manufacturer and to provide it with a summary of the information to be disclosed, if the product is to be designated or described in such a way as to permit the public to ascertain readily the manufacturer's identity. The manufacturer must be given a reasonable opportunity to submit comments regarding the information. And the Commission must take reasonable steps to assure that such information is accurate and that disclosure is "fair in the circumstances and reasonably related to effectuating the purposes" of the CPSA. If the Commission subsequently finds that it has made public disclosure of inaccurate or misleading information that adversely reflects on a manufacturer's products or practices, the Commission must "publish a retraction" in a manner "similar to that in which such disclosure was made. . . ." [2]

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[2] In its entirety, § 6 states:

"(a)(1) Nothing contained in this Act shall be deemed to require the release of any information described by subsection (b) of section 552, title 5, United States Code, or which is otherwise protected by law from disclosure to the public.

"(2) All information reported to or otherwise obtained by the Commission or its representative under this Act which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, shall be considered confidential and shall not be disclosed, except that such information may be disclosed to other officers or employees concerned with carrying out this Act or when relevant in any proceeding under this Act. Nothing in this Act shall authorize the withholding of information by the Commission or any officer or employee under its control from the duly authorized committees of the Congress.

"(b)(1) Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable,

The relevant facts are set forth in a case decided by this Court earlier this Term, *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U. S. 375 (1980), and need not be restated in detail. Briefly, the Commission obtained from respondents various accident reports, most of which were accompanied by claims of confidentiality. The Commission subsequently decided, after receiving Freedom of Information Act (FOIA) requests from the Consumers Union of the United States, Inc., and the Public Citizen's Health Research Group (the requesters), to release even those accident reports that were claimed to be confidential. Not surprisingly, lawsuits were soon filed in several Federal District Courts. See *GTE Sylvania, Inc.* v. *Consumers Union, supra*, at 378, n. 1.

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notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. If the Commission finds that, in the administration of this Act, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

"(2) Paragraph (1) (except for the last sentence thereof) shall not apply to the public disclosure of (A) information about any consumer product with respect to which product the Commission has filed an action under section 12 (relating to imminently hazardous products), or which the Commission has reasonable cause to believe is in violation of section 19 (relating to prohibited acts), or (B) information in the course of or concerning any administrative or judicial proceeding under this Act." 86 Stat. 1212, 15 U. S. C. § 2055.

The District Court for the District of Delaware ultimately granted respondents' motion for summary judgment and permanently enjoined the Commission from disclosing the submitted accident reports, as well as data compiled on a computer printout from those reports. 443 F. Supp. 1152 (1977).[3] The District Court rejected the Commission's contention that § 6 (b)(1) applies only when the Commission affirmatively undertakes to disclose information to the public, but not when it merely complies with a request for information under the FOIA. It held that § 6 (b)(1) is applicable to disclosures in response to FOIA requests and that it establishes particular criteria for withholding information, thereby falling within the scope of Exemption 3 of the FOIA, 5 U. S. C. § 552 (b)(3). It also found that the Commission failed to comply with § 6 (b)(1) procedures in this case. Thus, it concluded that the release of the accident reports would be contrary to the CPSA. 443 F. Supp., at 1162.

The Court of Appeals for the Third Circuit affirmed. 598 F. 2d 790 (1979). After thoroughly examining the language and legislative history of § 6 (b)(1), it concluded that "Congress did not intend that provision to apply only to Commission press releases, news conferences, publication of reports and other forms of 'affirmative disclosure' of information obtained under the Act." 598 F. 2d, at 811. Rather, "the information disclosure requirements of the CPSA were meant to protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the Commission, through any means, of material obtained pursuant to its broad information-gathering powers. The policies designed to be served by section 6 (b)(1) would be severely undermined, if not eviscerated, were the Commission's interpretation to prevail." *Id.*, at 811–812.

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[3] Earlier decisions of the District Court are reported at 438 F. Supp. 208 (1977) and 404 F. Supp. 352 (1975). These decisions are discussed in *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U. S., at 377–378, and n. 1.

Petitioners repeat their contention here that § 6 (b)(1) was intended to provide safeguards for the release of information by the Commission only when the Commission makes public disclosures of information on its own initiative in carrying out its responsibilities under the CPSA. When information is released in this fashion, they argue, the Commission explicitly or implicitly represents that it believes the disclosed information to be true and that the public should rely on it. Brief for Petitioners 10. When the Commission merely releases information in response to an FOIA request, by contrast, they claim the Commission is obliged to release whatever materials it possesses and need not comply with § 6 (b)(1), because it has not made any express or implied statement regarding the documents released or the extent to which those documents reflect agency policy. Brief for Petitioners 11. Although there is some support for petitioners' interpretation of § 6 (b)(1) in legislative history contained in a Conference Report four years after the enactment of that section, see Part IV, *infra*, we agree with the Court of Appeals' determination that "legislative history" of this sort cannot be viewed as controlling.

II

We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Section 6 (b)(1) by its terms applies to the "public disclosure of *any* information" obtained by the Commission pursuant to its authority under the CPSA, and to any information "to be disclosed to the public in connection therewith." (Emphasis added.) Nothing in the language of that section, or in any other provision of the CPSA, supports petitioners' claim that § 6 (b)(1) is limited to disclosures initiated by the Commission. And as a matter of common usage the term

"public" is properly understood as including persons who are FOIA requesters. A disclosure pursuant to the FOIA would thus seem to be most accurately characterized as a "public disclosure" within the plain meaning of § 6 (b)(1).[4]

Section 6 (b)(2) of the CPSA, 15 U. S. C. § 2055 (b)(2), contains specific exceptions to the requirements of § 6 (b)(1).[5] But the list of exceptions does not include the disclosure of information in response to an FOIA request. If Congress had intended to exclude FOIA disclosures from § 6 (b)(1) it could easily have done so explicitly in this section as it did with respect to the other listed exceptions. That Congress was aware of the relationship between § 6 and the FOIA when it enacted the CPSA is exhibited by the fact that Congress in § 6 (a)(1) specifically incorporated by reference the nine exemptions of the FOIA, 5 U. S. C. § 552 (b). We are consequently reluctant to conclude that Congress' failure to include FOIA requests within the exceptions to § 6 (b)(1) listed in § 6 (b)(2) was unintentional.

Finally, § 25 (c) of the CPSA, 15 U. S. C. § 2074 (c), further supports the conclusion that § 6 (b)(1) was not intended to distinguish between information disclosed to the public

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[4] Petitioners argue that the exception to the 30-day notice requirement where "the Commission finds out that the public health and safety requires a lesser period of notice" suggests that the term "public disclosure" in § 6 (b)(1) should be read to encompass only affirmative disclosures by the Commission. The exception, they claim, makes little sense as applied to FOIA disclosures in that such disclosures are the result of the Commission's statutory obligation to comply with an FOIA request rather than a Commission-initiated decision to assist the public. The language of § 6 (b)(1), however, does not limit the scope of that section to disclosures of information intended "to assist the public." Rather, it refers broadly to any "public disclosure." And, as discussed in Part III, *infra*, the legislative history indicates that the concerns underlying § 6 (b)(1) were not limited to information affirmatively disclosed by the Commission.

[5] These exceptions, for example, include the disclosure of information concerning an imminently hazardous product and disclosures in the course of an administrative or judicial proceeding under the CPSA.

pursuant to FOIA requests and information disclosed at the initiative of the Commission.[6] Section 25 (c) designates accident and investigation reports that do not identify injured parties and their physicians, and reports on research and demonstration projects as "public information" notwithstanding the fact that they might be exempted from disclosure under the FOIA and thus within the scope of § 6 (a)(1). Section 25 (c), however, specifically makes the disclosure of this information subject to the limitations of §§ 6 (a)(2) and 6 (b), whether it be "affirmatively" released by the Commission or released pursuant to an FOIA request. The language of the CPSA thus provides little basis for accepting petitioners' claim that § 6 (b)(1) does not apply to information released by the Commission in response to FOIA requests.

III

Petitioners next argue that the legislative history of the CPSA requires the conclusion that § 6 (b)(1) is inapplicable to FOIA requests despite the language of the statute. In making their argument, petitioners concede that "the pre-enactment history of this legislation does not directly address the precise issue of statutory construction involved in this case." Brief for Petitioners 33. They nonetheless maintain that the principal concern underlying the adoption of the section was the danger that the Commission might on its own initiative disseminate findings, reports, and other product information harmful to manufacturers without first assuring

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[6] Section 25 (c), as set forth in 15 U. S .C. § 2074 (c), states:

"Subject to sections 2055 (a)(2) and 2055 (b) of this title but notwithstanding section 2055 (a)(1) of this title, (1) any accident or investigation report made under this chapter by an officer or employee of the Commission shall be made available to the public in a manner which will not identify any injured person or any person treating him, without the consent of the person so identified, and (2) all reports on research projects, demonstration projects, and other related activities shall be public information."

the fairness and accuracy of the disclosure. We agree with petitioners that industry representatives were concerned about the harms resulting from information affirmatively disclosed by an agency. But petitioners have failed to establish that industry concerns were limited to information disclosed in this fashion.[7] More importantly, a full examination of the legislative history of the CPSA prior to its enactment indicates that for purposes of § 6 (b)(1) no distinction was made between information affirmatively disclosed by the Commission and information released pursuant to the FOIA.

The CPSA gave the Commission broad powers to gather, analyze, and disseminate vast amounts of private information. In granting the Commission such authority, Congress adopted safeguards specifically designed to protect manufacturers' reputations from damage arising from improper disclosure of

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[7] Thus, although as petitioners point out, a vice president of General Electric Co., James F. Young, cautioned against the dangers of information "[i]ssued under the dignity and with the apparent imprimatur of the U. S. Government," Consumer Product Safety Act: Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 92d Cong., 1st and 2d Sess., pt. 3, p. 1065 (1971–1972) (hereinafter Subcommittee Hearings), other statements by industry representatives expressed more general concerns about the disclosure by the Commission of information relating to product safety. For example, Bernard H. Falk, president of the National Electrical Manufacturers Association, stated that "[n]o information should be disclosed which is inaccurate, misleading or incomplete." *Id.*, at 1197. And in a prepared statement George P. Lamb, general counsel of the Association of Home Appliance Manufacturers, voiced the following concern:

"Authority to collect and disseminate information carries with it a responsibility not to disclose data that may injure a company or reveal confidential information. A statute establishing a standards-setting agency should state explicitly, as do many other federal statutes, that confidential data are not to be disseminated. A statute should also assure that *any* information to be made public is accurate, and that if it is derogatory the company it identifies has had an opportunity to refute it. H. R. 8110 contains provisions in § 4 (c) that would accomplish this." *Id.*, at 1237 (emphasis added).

information gathered and received by the Commission. The House Report on the CPSA states:

> "If the Commission is to act responsibly and with adequate basis, it must have complete and full access to information relevant to its statutory responsibilities. Accordingly, the committee has built into this bill broad information-gathering powers. It recognizes that in so doing it has recommended giving the Commission the means of gaining access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to trade secrets or other sensitive cost and competitive information. Accordingly, the committee has written into section 6 of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this act." H. R. Rep. No. 92–1153, p. 31 (1972).[8]

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[8] The provisions of § 6 of the CPSA, as finally enacted, can be traced to H. R. 8110, 92d Cong., 1st Sess. (1971), a bill introduced in the House on behalf of the administration. Section 4 (c) of this bill, which was also introduced in the Senate, contained information disclosure limitations that were virtually identical to those ultimately enacted in § 6 (b) (1) of the CPSA. It provided:

"(1) Nothing contained in this Act shall be deemed to require the release of any information described by subsection (b) of section 552, title 5, United States Code, or which is otherwise protected by law from disclosure to the public. The Secretary shall not make public information obtained by him under this Act which would disclose trade secrets, formulas, processes, costs, methods of doing business, or other competitive information not otherwise available to the general public; or the names or other means of identification of ill or injured persons without their express written consent.

"(2) (A) Except as provided by subparagraph (B) of this paragraph, not less than thirty days prior to his public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith, the Secretary shall provide such information to each manufacturer of any consumer product to which such information pertains, if

The House Report does not provide any indication that the safeguards for the release of CPSA information are inapplicable when the Commission discloses information in response to an FOIA request. And in its explanatory comments on § 6 (b)(1) the Report makes no distinction whatsoever between information released at the initiative of the Commission

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the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer, and shall provide such manufacturer with a reasonable opportunity to submit comments to the Secretary in regard to such information. Upon the request of such manufacturer, the Secretary shall publish such comments or a fair summary thereof, or a statement of the manufacturer of reasonable length in lieu thereof, concurrently and in association with the disclosure of the information to which such comments or statement appertain. The Secretary shall take reasonable steps to assure, prior to his public disclosure thereof, that information from which the identity of such manufacturer may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. If the Secretary finds that, in the administration of this Act, he has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer of, distributor of, importer of, or dealer in consumer products, he shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

"(B) Subparagraph (A) (except for the last sentence thereof) shall not apply to the public disclosure of (i) information about any consumer product with respect to which product the Attorney General has filed an action (or an action against a manufacturer thereof with respect to such product) under section 12, or which the Secretary has reasonable cause to believe is in violation of section 15, or (ii) information about any administrative or judicial proceeding under this Act."

Although the bill passed by the Senate omitted these safeguards, see S. Rep. No. 92–749, pp. 49, 51 (1972), the bill passed by the House, H. R. 1503, incorporated the administration's proposal in this regard. See H. R. Rep. No. 92–1153, pp. 5, 24 (1972). The information disclosure limitations contained in H. R. 15003 were accepted by the Conference Committee and ultimately became law. See H. R. Conf. Rep. No. 92–1593, p. 7 (1972).

and information disclosed pursuant to an FOIA request. Rather, it states:

> "Before disseminating *any* information which identifies the manufacturer or private labeler of a product, the Commission is directed to give the manufacturer or private labeler 30 days in which to comment on the proposed disclosure of information. This procedure is intended to permit the manufacturer or private labeler an opportunity to come forward with explanatory data or other relevant information for the Commission's consideration." H. R. Rep. No. 92–1153, *supra*, at 32 (emphasis added).

Nor does the Conference Report contain any suggestion that § 6 (b)(1) does not apply to FOIA requests. As observed by the Court of Appeals, the "conferees' description of section 6 (b)(1) is instructive in that the accuracy and fairness requirements for 'publicly disclosed information' are mentioned in almost the same breath as the description of section 6 (a)(1), stating that no information need be 'publicly disclosed' by the Commission if it is exempt from disclosure under the FOIA." 598 F. 2d, at 809.[9]

Further support for this construction of § 6 (b)(1) can be found in examining comments made with respect to earlier versions of the House bill.[10] In commenting on the disclosure

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[9] The Conference Report stated:

"The Commission was directed to take steps to assure that publicly disclosed information from which specific manufacturers or distributors could be identified was accurate and that the disclosure was fair in the circumstances and reasonably related to carrying out its duties. No information would be required to be publicly disclosed if it is information described in section 552 (b), title 5, United States Code (relating to information which is entitled to be protected from public access under the Freedom of Information Act), or which is otherwise protected by law from disclosure to the public." *Id.*, at 41.

[10] The conclusion that § 6 (b)(1) applies to FOIA requests is also supported by a statement of Representative James Broyhill, a member of the

provisions of the administration bill, H. R. 8110, Representative Moss, chairman of the Subcommittee on Commerce and Finance, which was considering the House bills, stated: "I am sure the subcommittee will want to examine carefully this proposed change in the Freedom of Information Act." Subcommittee Hearings, pt. 2, p. 300.[11] The operative information-disclosure requirements contained in § 4 (c) of H. R. 8110, absent a requirement that the Commission publish manufacturers' comments, were nonetheless enacted into law in § 6 (b). See n. 8, *supra*.

Section 4 (c) and the provision that was finally enacted as § 6 (b) by their terms include both affirmative disclosures by the Commission and information released pursuant to the FOIA. And the Department of Health, Education, and Welfare, the agency that drafted H. R. 8110, stated in its section-by-section analysis of the bill:

> "*Section 4* (*c*) would protect the Secretary's refusal to disclose information not required to be released by the [FOIA], and would expressly prohibit his disclosure of commercial secrets, or of illness or injury data revealing [the] identity of the victim.
>
> "It would also require the provision of thirty days notice to the manufacturer of any consumer product prior to the Secretary's public disclosure of information respecting that product, if such information would reveal the manufacturer's identity." Subcommittee Hearings, pt. 1, p. 188.

Conference Committee on the CPSA. In the House debates on the CPSA, Representative Broyhill stated that the proposed legislation, H. R. 15003, "requires the Commission to notify each manufacturer of its intent to release *any* information at least 30 days prior to disclosure and offer an opportunity for comment. This provision is not found in any other safety legislation." 118 Cong. Rec. 31381 (1972) (emphasis added).

[11] The statement was made following his observation that the administration bill, H. R. 8110, contained more restrictive disclosure provisions than his own bill, H. R. 8157. Subcommittee Hearings, pt. 2, p. 300.

These comments clearly do not support petitioners' reading of the present disclosure requirements of the CPSA. And the General Counsel of the Department of Commerce, in opposing the Senate's less restrictive proposal for the disclosure of information by the Commission, wrote:

> "[W]e believe that in the interest of fairness the disclosure of *any* information should be attendant with safeguards. These include prior notice to manufacturers, the right of the manufacturer to rebut false information, and a requirement that the information be fair and accurate." S. Rep. No. 92–749, p. 100 (1972) (emphasis added).

The legislative history of § 6 (b)(1) thus fails to establish that petitioners' proposed distinction should be read into the section.

IV

Petitioners also contend that legislative interpretations of § 6 (b)(1) made after the section was enacted and the Commission's administrative interpretation of that section support their proposed construction. Petitioners first rely on a statement by Representative Moss, one of the sponsors of the House bill. In testimony before a congressional Oversight Subcommittee, then Commission Chairman Richard O. Simpson explained that the Commission interpreted § 6 (b)(1) to be inapplicable to FOIA requests. Representative Moss then remarked: "As the primary author of both acts, I am inclined to agree with you." Regulatory Reform: Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Vol. IV, pp. 7–8 (1976). Petitioners also note that when Congress added § 29 (e), 15 U. S. C. § 2078 (e), to the CPSA in the Consumer Product Safety Commission Improvements Act of 1976, the Conference Committee explained the joint operation of the new section and § 6 (b) as follows:

> "The requirement that the Commission comply with section 6 (b) prior to another Federal agency's public

> disclosure of information obtained under the Act is not intended by the conferees to supersede or conflict with the requirements of the Freedom of Information Act (5 U. S. C. § 552 (a)(3) and (a)(6)). *The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.*" H. R. Conf. Rep. No. 94–1022, p. 27 (1976) (emphasis added).[12]

In evaluating the weight to be attached to these statements, we begin with the oft-repeated warning that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U. S.

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[12] Section 29 (e) was added to the CPSA to "prescrib[e] conditions under which the Commission may provide accident and investigation reports to other Federal agencies or State or local authorities engaged in activities relating to health, safety, or consumer protection." H. R. Conf. Rep. No. 94–1022, at 26. Section 29 (e), 90 Stat. 510, provides:

"The Commission may provide to another Federal agency or a State or local agency or authority engaged in activities relating to health, safety, or consumer protection, copies of any accident or investigation report made under this Act by any officer, employee, or agent of the Commission only if (1) information which under section 6 (a)(2) is to be considered confidential is not included in any copy of such report which is provided under this subsection; and (2) each Federal agency and State and local agency and authority which is to receive under this subsection a copy of such report provides assurances satisfactory to the Commission that the identity of any injured person and any person who treated an injured person will not, without the consent of the person identified, be included in—

"(A) any copy of any such report, or

"(B) any information contained in any such report,

"which the agency or authority makes available to any member of the public. No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section 6 (b)."

304, 313 (1960), quoted in *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 348–349 (1963).[13] And ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history. *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 311 (1979). We do not think that either Representative Moss' isolated remark or the *post hoc* statement of the Conference Committee with respect to § 6 (b) is entitled to much weight here.

While Representative Moss claimed sponsorship of the CPSA generally, he was not a sponsor of the original bill that ultimately provided that legislation with its provisions governing information disclosure. Rather he authored another bill, H. R. 8157, that contained much less restrictive disclosure requirements than those ultimately adopted.[14] His state-

[13] Petitioners invoke the maxim that states: "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969) (footnote omitted). With respect to subsequent *legislation*, however, Congress has proceeded formally through the legislative process. A mere statement in a conference report of such legislation as to what the Committee believes an earlier statute meant is obviously less weighty.

The less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment. While such history is sometimes considered relevant, this is because, as Mr. Chief Justice Marshall stated in *United States* v. *Fisher*, 2 Cranch 358, 386 (1805): "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." See *Andrus* v. *Shell Oil Co.*, 446 U. S. 657, 666, n. 8 (1980). Such history does not bear strong indicia of reliability, however, because as time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.

[14] Section 19 (d) of H. R. 8175, 92d Cong., 1st Sess. (1971), provided: "When the Commission finds that publication of any information obtained by it is in the public interest and would not give an unfair competitive advantage to any person, it is authorized to publish such informa-

ment is thus not one that provides a reliable indication as to congressional intention.[15]

An examination of the statement of the Conference Committee, as the Court of Appeals concluded, reveals that it also is not persuasive authority in support of petitioners' position. Section 29 (e) by its terms does not purport to interpret the scope of § 6 (b). Rather, it deals solely with the release of accident and investigation reports by the Commission to other agencies. See n. 12, *supra*. And as the Court of Appeals stated:

> "[T]he conference committee statement was made in the context of approving legislation that contained numerous and extensive amendments to the Consumer Product Safety Act; yet the problem before us here was not otherwise addressed by Congress in enacting the Improvements Act. The interpretation of section 6 (b) espoused by the conferees was not mentioned by the House committee that drafted the Improvements Act. *See* H. R. Rep. No. 94–325, 94th Cong., 1st Sess. 18 (1975). The Senate version of the Improvements Act did not contain a provision amending section 29. [H. R. Conf. Rep. No. 94–1022, p. 26.] In the debates in the House the amendment to section 29, and the relationship between section 6 (b) and the FOIA, were not

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tion in the form and manner deemed best adapted for public use, except that data and information which relates to a trade secret, shall be held confidential and shall not be disclosed, unless the Commission determines that it is necessary to carry out the purposes of this Act." Subcommittee Hearings, pt. 1, p. 68–69.

[15] In addition, Chairman Simpson submitted to the Oversight Subcommittee a proposed amendment to § 6 (b) (2) that would have added the release of information by the Commission under the FOIA to the list of exceptions from the requirements of § 6 (b) (1). Regulatory Reform: Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Vol. IV, p. 8 (1976). That proposed amendment was never reported out of Committee.

> mentioned. Nor was the conferees' interpretation of section 6 (b) mentioned in either House when the conference report was debated. See 122 Cong. Rec. 10,811 (House approval of the conference report); *id.*, 11,585 (Senate approval) (1976)." 598 F. 2d, at 810–811.

In light of this background, the statement of the Conference Committee is far from authoritative as an expression of congressional will under the oft-quoted factors enunciated in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).[16] For the same reasons, we reject petitioners' contention that the Commission's 1977 administrative interpretation should be afforded the degree of deference necessary for it to prevail here. See 42 Fed. Reg. 54304 *et seq.* (1977). This case presents a narrow legal issue that is readily susceptible of judicial resolution. Nor are we presented here with a situation in which there has been a longstanding contemporaneous administrative construction upon which those subject to the jurisdiction of the agency would have been likely to rely.[17]

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[16] Petitioners also assert that under § 29 (e) agencies that receive accident and investigation reports from the Commission would not have to comply with § 6 (b) (1) when FOIA requests are made for information in such reports, and thus there would be an inconsistency in the statutory scheme if the Commission were required to comply with § 6 (b) (1) before releasing such information. Although the other agencies themselves may not be required to comply with § 6 (b) (1), the inconsistency is nonetheless not readily apparent in that § 29 (e) states that "[n]o Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section 6 (b)." In any event, we need not address the scope of § 29 (e) here.

[17] The Commission did not reach its present interpretation of the statute until it met in executive session on October 6, 1975, 443 F. Supp. 1152, 1155, n. 6 (1977)—over six months after it had decided to release the information involved in this case and more than two months after the manufacturers' motions for preliminary injunction had been fully briefed and argued before the District Court. And it was not until October 5, 1977—two days before the Commission filed its brief opposing the manu-

V

Petitioners next argue that the interpretation of § 6 (b)(1) by the Court of Appeals is inconsistent with the FOIA time requirements for the release of information. The FOIA requires an agency to "determine within ten days . . . whether to comply with [an FOIA] request" and to notify the requester "immediately" of the agency's determination. 5 U. S. C. § 552 (a)(6)(A)(i). The FOIA also requires an agency to resolve any administrative appeal of a refusal to disclose within 20 days after the filing of the appeal. § 552 (a)(6)(A)(ii). Petitioners claim that if § 6 (b)(1) applies to FOIA requests the Commission will be unable to comply with FOIA time requirements.

Petitioners' argument assumes that despite the specific procedural safeguards set forth in § 6 (b)(1) the Commission must comply with FOIA time limitations. Federal agencies, however, are granted discretion to refuse FOIA requests when the requested material falls within one of the nine statutory exemptions set forth in 5 U. S. C. § 552 (b). Exemption 3 of the FOIA, 5 U. S. C. § 552 (b)(3), states that the FOIA does not apply to matters that are

> "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." [18]

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facturers' motions for summary judgment (App. 7) and two years after the District Court concluded that the Commission must comply with § 6 (b)(1) in responding to FOIA requests, 404 F. Supp., at 370—that the Commission's proposed rules were published. See 42 Fed. Reg. 54, 304 (1977). It is thus arguable that the Commission's interpretation here is primarily litigation inspired. Cf. *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 156 (1944).

[18] This exemption was amended in 1976 by § 5 (b) of the Government in the Sunshine Act, Pub. L. 94–409, 90 Stat. 1247. The amendment

Here § 6 (b)(1) sets forth sufficiently definite standards to fall within the scope of Exemption 3. It does not grant the Commission broad discretion to refuse to comply with FOIA requests. Rather, it requires that the Commission "take reasonable steps to assure" (1) that the information is "accurate," (2) that disclosure will be "fair in the circumstances," and (3) that disclosure will be "reasonably related to effectuating the purposes of [the CPSA]." [19] We therefore do not

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was to further define those statutes that "specifically exempt" material from disclosure. The Conference Report to the Sunshine Act states that the amendment was designed "to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U. S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. 1504)." H. R. Conf. Rep. No. 94–1441, p. 25 (1976). *Robertson* held that § 1104, which vested broad discretion in the Federal Aviation Administration to withhold information from the public, fell within the scope of Exemption 3. The amendment was designed to eliminate from Exemption 3 those statutes that granted administrative agencies such discretion with respect to the disclosure or nondisclosure of material within their possession. As stated in the Report of the House Committee on Government Operations on the Sunshine Act, which recommended the amendment:

"Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The committee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U. S. C. §§ 2161–2166, which provides explicitly for the protection of certain nuclear data.

"Under the amendment, the provision of the Federal Aviation Act of 1958 that was the subject of *Robertson*, and which affords the FAA Administrator *cart blanche* [*sic*] to withhold any information he pleases, would not come within exemption 3. . . ." H. R. Rep. No. 94–880, pt. 1, p. 23 (1976).

[19] The statute in *Robertson*, by contrast, provided:

"Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this Act or of information obtained by the Board or the Administrator, pursuant to the provisions of this Act,

believe there is any insoluble conflict between § 6 (b)(1) and the FOIA.[20]

VI

Finally, petitioners argue that requiring the Commission to comply with § 6 (b)(1) in meeting FOIA requests will impose insurmountable burdens on the agency. In making this claim, petitioners state that the Commission receives nearly 8,000 FOIA requests annually. The extent to which these requests will present problems of fairness and accuracy with respect to the information released by the Commission is entirely speculative. And in light of the fact that Exemption 3 is applicable to the disclosure of information controlled by § 6 (b)(1), we do not think these burdens will prove to be unbearable. Most importantly, our interpretation of the language and legislative history of § 6 (b)(1) reveals that any increased burdens imposed on the Commission as a result of its compliance with § 6 (b)(1) were intended by Congress in striking an appropriate balance between the interests of

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stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress." § 1104, 72 Stat. 797, 49 U. S. C. § 1504.

[20] In addition, when Congress enacted the CPSA in 1972, the FOIA required only that an agency make records "promptly available" to any person requesting them. Pub. L. 90–23, 81 Stat. 55. It was not until 1974, when Congress amended the FOIA, that the time requirements that petitioners argue conflict with § 6 (b)(1) were adopted. Pub. L. 93–502, § 1 (c), 88 Stat. 1562, 5 U. S. C. § 552 (a)(6). Because § 6 (b)(1) has not been amended since 1972, these requirements also do not provide a sound basis for inferring a congressional intent to limit the application of § 6 (b)(1) to disclosures initiated by the Commission.

consumers and the need for fairness and accuracy with respect to information disclosed by the Commission. Thus, petitioners' claim that the Commission's compliance with the requirements of § 6 (b)(1) will impose undue burdens on the Commission is properly addressed to Congress, not to this Court.

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

CALIFORNIA *v.* NEVADA

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 73, Orig. Argued April 14, 1980—Decided June 10, 1980

Held:

1. The Special Master was fully justified in invoking the doctrine of acquiescence in concluding that the true boundary between California and Nevada is that located by two surveys, funded by congressional appropriations in 1872 and 1892, since both States have acquiesced in those boundary lines from the time they were drawn. The issue of whether Congress had power to determine the lines even though an 1863 joint survey had been commissioned by the States, which both adopted the results thereof by statute, need not be decided, since it is not necessary that there be a particular relationship between the *origins* of a boundary and the legal *consequences* of acquiescence in that boundary. Longstanding acquiescence by the States can give the boundary lines the force of law whether or not federal authorities had the power to draw them. Pp. 130–132.

2. However, the Special Master's reference will not be expanded to authorize him to determine whether the United States should be made a party to the case and to make recommendations as to the quieting of title on various disputed borderlands. The ownership and title questions that remain typically will involve only one or the other State and the United States, or perhaps various citizens of those States, not disputes between the States. Thus, even if some of those questions do fall within this Court's original jurisdiction, they will not fall within its exclusive jurisdiction, and litigation in other forums is an appropriate means of resolving those questions. Pp. 132–133.

Exceptions to Special Master's report overruled, and report adopted in part.

BRENNAN, J., delivered the opinion for a unanimous Court.

James H. Thompson, Special Deputy Attorney General of Nevada, argued the cause for defendant. With him on the brief were *Richard H. Bryan,* Attorney General, *Larry D. Struve,* Chief Deputy Attorney General, and *Harry W. Swainston,* Deputy Attorney General.

Jan S. Stevens, Assistant Attorney General of California, argued the cause for plaintiff. With him on the briefs were *George Deukmejian,* Attorney General, and *N. Gregory Taylor,* Assistant Attorney General.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The report of the Special Master tenders for the Court's approval his determination of the true boundary between the States of California and Nevada. That boundary was the subject of numerous surveys in the latter half of the 19th century, and the central question presented in this original action is which, if any, of the lines which resulted properly marks the rugged border between the two States.[1] The Special Master combed the voluminous record and concluded that in combination the two most recent surveys had fixed a boundary to which both States have acquiesced for the better part of a century. Applying the doctrine of prescription and acquiescence, he concluded that the boundary so fixed was the proper one. Nevada takes exception to that determination on several grounds. We overrule those exceptions and, with the qualifications hereinafter noted, approve and adopt the Special Master's report.

**Solicitor General McCree* and *Deputy Solicitor General Claiborne* filed a memorandum for the United States as *amicus curiae.*

[1] California instituted this original action on April 22, 1977, when it filed its motion for leave to file complaint and complaint. On June 29, 1977, we granted that motion and appointed the Special Master. Basically, California sought a declaration that the currently recognized line dividing the two States was in fact the lawful boundary. As counsel for the State characterized it at oral argument, the suit was in the nature of a quiet title action and was precipitated by growing doubts about the geographic accuracy of the existing line as well as concerns regarding the validity of certain titles which depended upon the location of the border. The Special Master's report was filed in this Court on October 29, 1979, 444 U. S. 922, and we set Nevada's exceptions and related matters for oral argument. 444 U. S. 1065 (1980).

I

The two straight-line segments that make up the boundary between California and Nevada were initially defined in California's Constitution of 1849. The first, the "north-south" segment, commences on the Oregon border at the intersection of the 42d parallel and the 120th meridian and runs south along that meridian to the 39th parallel. And the second, the "oblique" segment, begins at that parallel and runs in a southeasterly direction to the point where the Colorado River crosses the 35th parallel. Cal. Const., Art. XII (1849). In 1850, when California was admitted to the Union, Congress approved the 1849 Constitution, and with it California's eastern boundary. Act of Sept. 9, 1850, 9 Stat. 452.

On the same day that it admitted California, Congress established a territorial government in the area immediately to the east. The organic Act for that new Territory—which was then called Utah—stated that it was to be "bounded on the west by the State of California." Act of Sept. 9, 1850, 9 Stat. 453. Eleven years later, the Territory of Nevada was created out of Utah. Congress indicated in the organic Act that Nevada might include portions of what was then California, but with the proviso that "so much of the Territory within the present limits of the State of California shall not be included within this Territory until the State of California shall assent to the same by an act irrevocable without the consent of the United States. . . ." Act of Mar. 2, 1861, 12 Stat. 210. No assent was ever given by California. Accordingly, when Nevada was admitted as a State in 1864 its western boundary and California's eastern one remained congruent.[2]

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[2] Nevada's Constitution stated that its boundary would proceed "in a North Westerly direction along [the oblique section of the] Eastern boundary line of the State of California to the forty third degree of Longitude West from Washington [and then] North along said forty third degree of West Longitude, and said Eastern boundary line of the State of California

Notwithstanding brief and incomplete surveying efforts in the decade after California was admitted, the actual location on the ground of that State's eastern boundary remained highly uncertain—so much so that fighting broke out over the precise whereabouts of a small valley on the north-south line above Lake Tahoe, and a border town along the oblique line found itself claimed as the seat of both a Nevada and a California county.[3] These difficulties led California and Nevada to commission a joint survey of their border. Conducted in 1863, that survey located what is known as the Houghton-Ives line from the Oregon border south along the 120th meridian to a point in Lake Tahoe and then southeast for about 103 miles along the oblique line in the direction of the relevant point on the Colorado River. The remaining 300-plus miles of the oblique border were not surveyed.[4]

Both California and Nevada adopted the Houghton-Ives line by statute, but its significance was to be short-lived. In 1867–1868 Daniel G. Major surveyed the Oregon-California boundary for the General Land Office. One step in his work was to locate the intersection of that boundary and the 120th meridian. This he did, at a point more than two miles west

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to the forty second degree of North Latitude. . . ." Nev. Const., Art. XIV, § 1 (1864). Although it turns out that the 43d degree of longitude west from Washington does not exactly coincide with the 120th meridian west of Greenwich—which was the north-south reference in the California Constitution—the Special Master concluded that the Congress that approved Nevada's Constitution was of the view that the two lines were identical. Certainly the language of the Nevada Constitution supports this conclusion by seeming to equate the 43d degree of longitude west of Washington with the eastern boundary of California. In any event, we need not explore the matter further since it would be relevant only were we to require a new survey of one or the other longitudinal line, and we do not find such a new survey necessary.

[3] Indeed, the town—Aurora—elected representatives to both the California and Nevada Legislatures in 1862, and those representatives apparently became speakers of their respective legislatures.

[4] Two years later one James S. Lawson extended the oblique portion of the Houghton-Ives line another 73 miles.

of that meridian as marked by Houghton-Ives. This discrepancy[5] eventually led the Commissioner of the General Land Office to recommend that Congress appropriate money for a full survey of the eastern boundary of California. His recommendation was followed in 1872.

The new survey was conducted by Allexey W. Von Schmidt. While originally instructed to commence his north-south line at the point located by Daniel G. Major, Von Schmidt concluded that the actual 120th meridian lay not only east of "Major's corner," but six-tenths of a mile east of the Houghton-Ives line as well. Accordingly, Von Schmidt marked a new north-south line starting at this location. His survey of the oblique boundary also had its surprises. From the intersection of his north-south segment and the 39th parallel he set off in what he thought was the direction of the intersection of the Colorado River and the 35th parallel. Unfortunately, the Colorado River had shifted since the point for which he was aiming had been marked, and rather than end at the wrong place he attempted to correct the line he was marking. It later turned out that his corrections were not complete and his line not entirely straight. But linear or not, his work did generate a boundary. And, although neither State adopted it by statute, the Von Schmidt survey won gradual acceptance in both California and Nevada.

In the 1880's, however, substantial doubts about the accuracy of the oblique segment of the Von Schmidt line were voiced in Washington. As a result, Congress appropriated funds in 1892 for a new survey of that segment. The survey was undertaken by personnel of the United States Coast and Geodetic Survey and conducted over a period of several years. It yielded a new oblique line and determined that the one charted by Von Schmidt had been neither straight nor accu-

[5] A third survey, conducted in the summer of 1872 near the Oregon border, contributed to the confusion by concluding that the 120th meridian lay to the east of the locations pinpointed by both Major and Houghton-Ives.

rate. Both States adopted the United States Coast and Geodetic Survey line by statute—California in 1901 and Nevada in 1903.[6]

The Special Master concluded that the Von Schmidt survey of the north-south line and the United States Coast and Geodetic Survey one of the oblique line were the most recent and accurate surveys available. While noting that Von Schmidt had not been entirely accurate, the Master found that the north-south line that resulted from his survey had been consistently and routinely recognized and accepted by agencies and departments of the State of Nevada for more than a century. That the Houghton-Ives line was the first north-south boundary marked and the only one approved by statute was, he found, beside the point because as a practical matter that boundary had been superseded a decade after it was established and neither State had objected.[7] As for the oblique boundary, the Master found that the United States Coast and Geodetic Survey line had not only been adopted by statute, but also been accepted and used by the two States for nearly 80 years. Since both States had treated these lines as the boundary from the time they were drawn, the Master invoked the doctrine of acquiescence to determine that together they in fact constitute the true and correct interstate boundary.

II

The State of Nevada's primary contention is that the Special Master's reliance upon the doctrine of acquiescence was

[6] Nevada's statute was in effect when the present litigation was commenced, although it has subsequently been repealed.

[7] California notes that Nevada welcomed the Von Schmidt survey at the time it was conducted. Indeed, the Surveyor General of that State remarked that "within a year the State will be inclosed by an actual surveyed line and monuments, and the troubles heretofore existing, to State and county officials, in dealing with an imaginary line, will be entirely and forever obviated." Report of the Surveyor General and State Land Register of the State of Nevada for the years 1871 and 1872, p. 8.

in error. Basically, the argument is that once Nevada and California had conducted the 1863 joint survey which produced the Houghton-Ives line the Federal Government had no constitutional authority to mark a different line which had the effect of removing territory from one State and granting it to the other. Since the Congress was without power to determine the Von Schmidt and United States Coast and Geodetic Survey lines, the argument continues, they are without legal effect. And because States may not confer upon the Federal Government a power which the Constitution does not vest in it, acquiescence in those lines cannot make them lawful. Thus, Nevada concludes, either (1) Congress is constitutionally empowered to redraw the boundaries of the several States, in which case the Von Schmidt and Geodetic Survey lines may be upheld regardless of acquiescence, or (2) Congress is constitutionally powerless to alter those boundaries, in which case no mere century of acquiescence can convert a usurpation into law.

The flaw in this argument is that it assumes that there must be a particular relationship between the *origins* of a boundary and the legal *consequences* of acquiescence in that boundary. In fact, however, no such relationship need exist. Longstanding acquiescence by California and Nevada can give the Von Schmidt and Geodetic Survey lines the force of law whether or not federal authorities had the power to draw them. And the determination that the two States' conduct has had precisely this effect, therefore, does not place any sort of constitutional imprimatur upon the federal actions involved. See *Ohio* v. *Kentucky*, 410 U. S. 641, 648–651 (1973); *Indiana* v. *Kentucky*, 136 U. S. 479, 509–510 (1890). Accordingly, we need not address the issue of federal power to which Nevada adverts. It is enough that California claims and has always claimed all territory up to a specifically described boundary—the 120th meridan and the oblique line with which it connects—and that both States have long ac-

quiesced in particular lines marking that boundary.[8] If Nevada felt that those lines were inaccurate and operated to deprive it of territory lawfully within its jurisdiction the time to object was when the surveys were conducted, not a century later. *Ohio* v. *Kentucky, supra,* at 649. In consequence, we hold that in these circumstances the Special Master was fully justified in invoking the doctrine of acquiescence.[9]

III

Having determined that the Special Master's resolution of the boundary dispute was proper, we turn to his recommendations regarding the quite separate issue of ownership of various

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[8] Nor is Nevada's position saved by the contention that California could not profit by the doctrine of acquiescence because its claim to the lands up to the Von Schmidt and United States Coast and Geodetic Survey lands was not made under color of title or claim of right. The fact is that California's claim has always been for all lands on its side of the boundary described rather specifically in its Constitution. So long as its claims were made under a survey that purported to reflect that boundary, it had colorable title and a claim of right.

[9] Several subsidiary issues relating to the California-Nevada border are considered in the Special Master's recommendations. First, it turns out that Von Schmidt's north-south line and the United States Coast and Geodetic Survey oblique line do not intersect at precisely the 39th parallel, as in theory they should. The Special Master suggests that the two States be given the opportunity to determine by agreement the point in Lake Tahoe where the two lines meet. Failing such an accord, he indicates that he would recommend a solution; but this probably will not be necessary since the parties are apparently in agreement that if the balance of the Master's report is accepted the best course is to extend the oblique line in a northwesterly direction to the point where it crosses the north-south line. This solution to the problem is entirely permissible. Cf. *New Hampshire* v. *Maine,* 426 U. S. 363 (1976). Second, the Master recommends that he be authorized to arrange for surveys, at the parties' expense, if necessary to resolve disputes over the precise location of portions of either of the lines we approve today. That, too, seems appropriate. And third, he states that we should reserve the taxing of costs until after a further report—a suggestion which we will follow since the possibility of partial surveys would make an assessment at this time premature.

disputed borderlands. This matter is here on California's motion to file a second amended complaint and bifurcate issues, which seeks further proceedings before the Special Master after the boundary questions are determined. Specifically, the United States has apparently confirmed or "clear-listed" to California and Nevada certain parcels that turn out to be on the "wrong" side of the boundary between those States. The Special Master was of the view that California's motion should be allowed and that he should be authorized (1) to determine whether the United States should be made a party to this case and (2) to make recommendations as to the quieting of title on various borderlands.

We decline at this point to expand the Special Master's reference. The ownership and title questions that remain typically will involve only one or the other State and the United States, or perhaps various citizens of those States. Disputes between California and Nevada are not in the offing.[10] In consequence, even if some of the ownership questions to come do fall within our original jurisdiction, they will not fall within our exclusive jurisdiction. 28 U. S. C. § 1251 (1976 ed., Supp. II). Under these circumstances we see no reason to refer the matter to the Special Master. On the contrary, litigation in other forums seems an entirely appropriate means of resolving whatever questions remain.

In sum, we overrule Nevada's exceptions and approve and adopt the Special Master's report and recommendations except insofar as those recommendations would allow California's second amended complaint and permit proceedings relating to the ownership of disputed lands on the California-Nevada boundary.

So ordered.

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[10] At oral argument, counsel for the State of California conceded that he knew of no instance in which both States claimed the same parcel.

WASHINGTON ET AL. *v.* CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

No. 78-630. Argued October 9, 1979—Decided June 10, 1980*

These cases concern challenges of several Indian Tribes to efforts by the State of Washington to apply various state taxes and other laws to transactions and activities occurring on Indian reservations. Washington imposes a cigarette excise tax on the "sale, use, consumption, handling, possession or distribution" of cigarettes within the State. It also imposes a general retail sales tax on sales of personal property, including cigarettes. The State sought to compel Indian retailers to collect both taxes with respect to sales of cigarettes to non-Indians and the latter tax with respect to sales of other goods as well. In addition, the State sought to apply its motor vehicle excise tax and mobile home, camper, and trailer taxes—which are imposed for the privilege of using the covered vehicles in the State—to vehicles owned by the Tribes or their members and used both on and off the reservation. Finally, the State took steps to assume civil and criminal jurisdiction over the affected reservations. The Indian Tribes involved in this litigation have each adopted ordinances imposing their own taxes upon on-reservation sales of cigarettes. In actions brought in Federal District Court, they sought declaratory and injunctive relief against enforcement of the state sales and cigarette taxes, and in particular against the State's seizure of untaxed cigarettes destined for delivery to the reservations, contending that those taxes could not lawfully be applied to tribal cigarette sales. In addition, the Tribes challenged the State's efforts to apply its vehicle excise taxes to Indian-owned vehicles and asserted that the State's assumption of jurisdiction was invalid. The complaints alleged, *inter alia*, that the challenged taxes were contrary to the Indian Commerce Clause. Because injunctive relief against enforcement of state statutes was sought, a three-judge District Court was convened pursuant to the then applicable requirement of 28 U. S. C. § 2281 (1970 ed.) that an injunction restraining the enforcement of any state statute shall not be granted

*Together with *Washington* v. *United States et al.*, also on appeal from the same court, and No. 78-60, *Confederated Tribes of the Colville Indian Reservation et al.* v. *Washington*, also on appeal from the same court but not argued. See n. 32, *infra*.

by any district court upon the ground of the statute's unconstitutionality unless the application therefor is heard and determined by a three-judge court. After a consolidated proceeding, the District Court held that (1) it had jurisdiction as a three-judge court; (2) the cigarette tax could not be applied to on-reservation transactions because it was preempted by the tribal taxing ordinance and constituted an impermissible interference with tribal self-government; (3) the retail sales tax could not be applied to tribal cigarette sales; (4) the State could not impose certain recordkeeping requirements on the Tribes in connection with various tax-exempt sales; (5) the vehicle excise taxes could not be imposed on vehicles owned by the Tribes and their members; and (6) the State's assumption of civil and criminal jurisdiction over certain of the Tribes was unconstitutional. The court enjoined enforcement of the statutes it had invalidated, and the State moved unsuccessfully for a new trial.

Held:

1. The Tribes' Commerce Clause claims are not "insubstantial" and are not rendered inescapably frivolous by the decisions in *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, and *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, so as to defeat application of § 2281. In addition, the Tribes' attack on the official seizure of cigarettes bound for the reservations also triggers the three-judge requirement of § 2281. Accordingly, this Court has jurisdiction over the appeals under 28 U. S. C. § 1253, which authorizes a direct appeal to this Court from an order granting an injunction in a suit "required by any Act of Congress to be heard and determined by a district court of three judges." Pp. 145–149.

2. The State's motion for a new trial on issues other than the motor-vehicle-tax and assumption-of-jurisdiction issues rendered nonfinal the disposition of all issues between the parties, and thus the State's appeal from the District Court's resolution of those two issues was timely under 28 U. S. C. § 2101 (b), where it was filed within 60 days of the denial of the motion for a partial new trial but more than 60 days after the District Court's decision on those two issues. Accordingly, the appeal from such decision is properly before this Court. Pp. 149–150.

3. The imposition of Washington's cigarette and sales taxes on on-reservation purchases by nonmembers of the Tribes is valid. Pp. 150–162.

(a) The Tribes have the power to impose their cigarette taxes on nontribal purchases, since the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested

of it by federal law or necessary implication of their dependent status. Here, there is no federal statute showing any congressional departure from the view that tribes have such power, and tribal powers are not implicitly divested by virtue of the tribes' dependent status. Pp. 152–154.

(b) But the Tribes' involvement in the operation and taxation of cigarette marketing on the reservation does not oust the State from any power to exact its sales and cigarette taxes from nonmembers purchasing cigarettes at tribal smokeshops. Principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, do not authorize Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere. Federal statutes, such as the Indian Reorganization Act of 1934, the Indian Financing Act of 1974, and the Indian Self-Determination and Education Assistance Act of 1975, while evidencing a congressional concern with fostering tribal self-government and economic development, do not go so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State. Washington does not infringe the right of reservation Indians to make their own laws and be ruled by them, merely because the result of imposing taxes will be to deprive the Tribes of revenues which they currently are receiving. Pp. 154–157.

(c) The Indian Commerce Clause does not, of its own force, automatically bar all state taxation of matters significantly touching the political and economic interests of the Tribes. That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce, but Washington's taxes are applied in a nondiscriminatory manner to all transactions within the State and do not burden commerce that would exist on the reservations without respect to the tax exemption. Although the result of these taxes will be to lessen or eliminate tribal commerce with nonmembers, that market existed in the first place only because of a claimed exemption for these very taxes. Such taxes do not burden commerce that would exist on the reservations without respect to the tax exemption. P. 157.

(d) The Tribes failed to show that business at the smokeshops would be significantly reduced by a state tax without a credit as compared to a state tax with a credit. Pp. 157–158.

(e) There is no direct conflict between the state taxes and the Tribes' cigarette ordinances so as to warrant invalidation of the state taxes on grounds of pre-emption or violation of the principle of tribal self-government. Pp. 158–159.

(f) The State may validly require, as a minimal burden, the tribal smokeshops to affix tax stamps purchased from the State to individual

packages of cigarettes prior to the time of sale to nonmembers of the Tribe. Cf. *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463. P. 159.

(g) The State's recordkeeping requirements are valid *in toto*. The Tribes failed to demonstrate that such requirements for exempt sales are not reasonably necessary as a means of preventing fraudulent transactions. Pp. 159–160.

(h) The State's interest in taxing nontribal purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes. Pp. 160–161.

(i) The State's interest in enforcing its taxes is sufficient to justify its seizure of unstamped cigarettes as contraband if the Tribes do not cooperate in collecting the taxes. Pp. 161–162.

4. The motor vehicle and mobile home, camper, and trailer taxes cannot properly be imposed upon vehicles owned by the Tribes or their members and used both on and off the reservations. *Moe, supra*. Pp. 162–164.

5. The District Court erred in holding that the State's assumption of civil and criminal jurisdiction over the Makah and Lummi Reservations was unlawful. *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, controlling. P. 164.

446 F. Supp. 1339, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and STEVENS, JJ., joined; in Parts I, II, III, IV–B (1), IV–D, V, and VI of which BRENNAN and MARSHALL, JJ., joined; in Parts I, II, III, IV (except IV–B (2)), and VI of which STEWART, J., joined; and in Parts I, II, III, IV–C, IV–E, and VI of which REHNQUIST, J., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 164. STEWART, J., filed an opinion concurring in part and dissenting in part, *post*, p. 174. REHNQUIST, J., filed an opinion concurring in part, concurring in the result in part, and dissenting in part, *post*, p. 176.

Slade Gorton, Attorney General of Washington, argued the cause for appellants. With him on the briefs were *Philip H. Austin*, Deputy Attorney General, *Richard H. Holmquist*, Senior Assistant Attorney General, and *Timothy R. Malone*, *Larry R. Schreiter*, and *Matthew J. Coyle*, Assistant Attorneys General.

Steven S. Anderson argued the cause for appellees Confederated Tribes of the Colville Indian Reservation et al. With

him on the brief were *Robert L. Pirtle* and *Alvin J. Ziontz*. *James B. Hovis* argued the cause and filed a brief for appellee Confederated Tribes and Bands of the Yakima Indian Nation. *Deputy Solicitor General Claiborne* argued the cause for the United States. With him on the brief were *Solicitor General McCree*, *Assistant Attorney General Moorman*, *Edward J. Shawaker*, and *Anne S. Almy*.†

MR. JUSTICE WHITE delivered the opinion of the Court.

In recent Terms we have more than once addressed the intricate problem of state taxation of matters involving Indian tribes and their members. *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973). We return to that vexing area in the present cases. Although a variety of questions are presented, perhaps the most significant is whether an Indian tribe ousts a State from any power to tax on-reservation purchases by nonmembers of the tribe by imposing its own tax on the transaction or by otherwise earning revenues from the tribal business. A three-judge District Court held for the Tribes. We affirm in part and reverse in part.

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†Briefs of *amici curiae* urging reversal were filed by *Helena S. Maclay*, *Deirdre Boggs*, and *Keith C. Rennie*, Special Assistant Attorneys General, for the State of Montana; and by *Frederick J. Martone* for the Salt River Project Agricultural Improvement and Power District et al.

Briefs of *amici curiae* urging affirmance were filed by *L. Lamar Parrish* for the All Indian Pueblo Council, Inc.; by *Reid Peyton Chambers* and *Harry R. Sachse* for the Assiniboine and Sioux Tribes of the Fort Peck Reservation et al.; and by *Charles A. Hobbs*, *Stephen H. Whilden*, and *Bertram E. Hirsch* for the National Congress of American Indians, Inc., et al.

Michael Taylor, *John H. Clinebell*, *Jeffrey S. Schuster*, *Russell W. Busch*, and *Robert D. Dellwo* filed a brief for the Quinalt Indian Nation et al. as *amici curiae*.

I

These cases are here on the State of Washington's appeal from declaratory judgments and permanent injunctions entered by the District Court at the close of consolidated proceedings in two separate cases that raised related issues. 446 F. Supp. 1339 (ED Wash. 1978). The first case, *Confederated Tribes of the Colville Indian Reservation* v. *State of Washington*, Civ. No. 3868, was filed on May 17, 1973, by the Confederated Tribes of the Colville Reservation (Colville), Makah, and Lummi Tribes. The second, *United States of America and Confederated Bands and Tribes of the Yakima Indian Nation* v. *State of Washington*, Civ. No. 3909, was commenced on July 18, 1973, by the United States on behalf of the Confederated Bands and Tribes of the Yakima Indian Nation (Yakima Tribe).[1] In each action, the complainants contended that the State's cigarette and tobacco products taxes[2] could not lawfully be applied to sales by on-reservation tobacco outlets. They sought declaratory judgments to that effect, as well as injunctions barring the State from taking any measures to enforce the challenged taxes. In particular, the plaintiffs sought to enjoin the State from seizing as contraband untaxed cigarettes destined for delivery to their reservations.[3] In the *Colville* case, the Tribes also chal-

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[1] On April 24, 1974, the Yakima Tribe intervened as a plaintiff in the United States' case. Its complaint appears at App. 149.

[2] The state tobacco products tax, which is imposed on cigars and pipe tobacco pursuant to Wash. Rev. Code, ch. 82.26 (1976), is not before us. The District Court concluded that that tax fell upon the Indian sellers and not upon the non-Indian purchasers. 446 F. Supp. 1339, 1355, n. 15 (ED Wash. 1978). The State did not appeal from this holding, Brief for Appellants in No. 78–630, p. 55, n. 40, and all parties agree that in consequence the tobacco products tax may not be imposed on sales by tribal dealers.

[3] The Tribes also sought damages for interference with their cigarette businesses. The damages issues in both cases were remanded by the three-judge court to a single District Judge. 446 F. Supp., at 1367, 1373.

lenged the State's assumption of civil and criminal jurisdiction over their reservations and, by amended pleadings, attacked the application of the State's vehicle excise taxes to Indian-owned vehicles. The *Yakima* case did not present these latter issues, but it did make a broad attack on the application of the State's general retail sales tax to on-reservation transactions.

From the time of filing, the two cases pursued closely parallel courses. On November 5, 1973, a temporary restraining order against the State's enforcement of the taxing statutes was issued in each. App. 13, 147. Thereafter, because the complaints sought injunctive relief against the enforcement of state statutes, a three-judge District Court was convened pursuant to the then applicable requirement of 28 U. S. C. § 2281 (1970 ed.).[4] On September 6, 1974, the three-judge court issued preliminary injunctions restraining the State from enforcing the challenged taxes against the Tribes. App. 15, 156. There followed extensive discovery,[5] after which the parties to each case reached agreement on pretrial orders setting forth facts and clarifying the issues.

Trial was held in both cases on March 28, 1977, and the three-judge court entered its consolidated decision on February 22, 1978. The court concluded (1) that it had jurisdiction as a three-judge court to consider the issues presented; (2) that the state cigarette tax could not be applied to on-reservation transactions because it was pre-empted by the tribal taxing ordinances and constituted an impermissible interference with tribal self-government; (3) that the state

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[4] Although § 2281 was subsequently repealed, Act of Aug. 12, 1976, § 1, 90 Stat. 1119, it was expressly left in place for cases which, like those before us, were pending on the date of repeal. § 7, 90 Stat. 1120. We consider issues concerning the applicability of the former § 2281 to these cases in Part III, *infra*.

[5] Proceedings in both cases were stayed for several months, however, pending this Court's decisions in *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), and *Bryan* v. *Itasca County*, 426 U. S. 373 (1976).

retail sales tax could not be applied to tribal cigarette sales, but could be applied to sales of other goods to non-Indians; (4) that the State could not impose certain recordkeeping requirements in connection with various tax-exempt sales; (5) that the State could not impose its vehicle excise taxes upon vehicles owned by the Tribes and their members; and (6) that the State's assumption of civil and criminal jurisdiction over the Makah and Lummi Tribes was unconstitutional. The court enjoined enforcement of the statutes it had struck down, and the State moved unsuccessfully for a new trial. This appeal followed. We postponed consideration of certain jurisdictional questions to the merits. 440 U. S. 905 (1979).

We begin by sketching the relevant factual background, which is not seriously in dispute.[6] Thereafter, we explore the jurisdictional questions previously postponed and then turn to the merits.

II

The State of Washington levies a cigarette excise tax of $1.60 per carton,[7] on the "sale, use, consumption, handling, possession or distribution" of cigarettes within the State. Wash. Rev. Code § 82.24.020 (1976). The tax is enforced with tax stamps; and dealers are required to sell only cigarettes to which such stamps have been affixed. § 82.24.030. Indian tribes are permitted to possess unstamped cigarettes for purposes of resale to members of the tribe, but are required by regulation to collect the tax with respect to sales to nonmembers. § 82.24.260; Wash. Admin. Code § 458–20–192

[6] Our statement of the factual background is drawn in large measure from the opinion of the District Court, 446 F. Supp., at 1345–1349, 1368–1370.

[7] The cigarette excise tax is imposed pursuant to Wash. Rev. Code § 82.24.020 (1976). That provision authorizes a levy of 6.5 mills per cigarette. The tax is brought up to its full amount by Wash. Rev. Code §§ 28A.47.440 and 73.32.130 (1976), which add 0.5 mill and 1 mill respectively.

(1977).[8] The District Court found, on the basis of its examination of state authorities, that the legal incidence of the tax is on the purchaser in transactions between an Indian seller and a non-Indian buyer.[9]

The State has sought to enforce its cigarette tax by seizing as contraband unstamped cigarettes bound for various tribal reservations. It claims that it is entitled to make such seizures whenever the cigarettes are destined to be sold to non-Indians without affixation of stamps or collection of the tax.

Washington also imposes a sales tax on sales of personal property, including cigarettes. Wash. Rev. Code § 82.08.020 (1976). This tax, which was 5% during the relevant period, is collected from the purchaser by the retailer. § 82.08.050. It does not apply to on-reservation sales to reservation Indians. Wash. Admin. Code § 458–20–192 (1977).

The state motor vehicle excise tax is imposed on "the privilege of using in the state any motor vehicle." Wash. Rev. Code § 82.44.020 (Supp. 1977). The tax is assessed annually, and during the relevant period the amount was 2%

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[8] Initially the State asserted that it could tax all tribal cigarette sales, regardless of whether the buyer was Indian or non-Indian. Its theory was that Pub. L. 280, 67 Stat. 588, granted it general authority to tax reservation Indians. After this theory was rejected in *Bryan* v. *Itasca County*, *supra*, the State abandoned any claim of authority to tax sales to tribal members. See 446 F. Supp., at 1346, n. 4.

[9] *Id.*, at 1352–1355. Essentially, the court accepted the State's contention that the tax falls upon the first event which may constitutionally be subjected to it. In the case of sales by non-Indians to non-Indians, this means the incidence of the tax is on the seller, or perhaps on someone even further up the chain of distribution, because that person is the one who first sells, uses, consumes, handles, possesses, or distributes the products. But where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973), the first taxable event is the use, consumption, or possession by the non-Indian purchaser. Hence, the District Court concluded, the tax falls on that purchaser. We accept this conclusion.

of the fair market value of the vehicle in question. In addition, the State imposes an annual tax in the amount of 1% of fair market value on the privilege of using campers and trailers in the State. § 82.50.400 (1976).[10]

Each of the Tribes involved in this litigation is recognized by the United States as a sovereign Indian tribe. Each is governed by a business or tribal council approved by the Secretary of the Interior.[11] The Colville Tribe has some 5,800 members, of whom about 3,200 live on the Colville Indian Reservation.[12] Enrolled members of the Tribe constitute just under half of the reservation's population. The Lummi Tribe has approximately 2,000 members. Roughly 1,250 of them live on the reservation.[13] The Makah Tribe has about 1,000 members. Some 900 live on the reservation.[14] The Colville, Lummi, and Makah Reservations are isolated and underdeveloped. Many members reside in mobile homes. Most own at least one automobile which is used both on and off the reservation.

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[10] The same chapter provided for an excise tax on mobile homes. Initially, the State sought to apply this tax to Indians as well; but after *Bryan* v. *Itasca County*, 426 U. S. 373 (1976), and *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), it no longer attempts to do so. 446 F. Supp., at 1365.

[11] The Makah Tribe is organized under the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.* While the Lummi and Colville Tribes do have federally-approved constitutions, they voted in 1935 not to come under that Act. 446 F. Supp., at 1345, n. 2.

[12] The Colville Reservation encompasses 1.3 million acres in the northeastern section of Washington. It was established by Executive Order on July 2, 1872. 1 C. Kappler, Indian Affairs, Laws and Treaties 916 (2d ed. 1904).

[13] The Lummi Reservation encompasses 7,319 acres, most of them on a peninsula near Bellingham, Wash. It was established by the Treaty of Point Elliott in 1855. 12 Stat. 927.

[14] The Makah Reservation encompasses 28,000 acres at the northwest tip of the Olympic Peninsula. It too was established by treaty in 1855. Treaty with the Makah Tribe, 12 Stat. 939. Roughly 63% of its inhabitants are enrolled members of the Tribe.

The Yakima Tribe has more than 6,000 members, of whom about 5,000 live on the reservation.[15] Enrolled members, however, constitute less than one-fifth of the reservation's population. The balance is made up of approximately 1,500 Indians who are not members of the Tribes and more than 20,000 non-Indians.

The Colville, Lummi, and Makah Tribes have nearly identical cigarette sales and taxing schemes. Each Tribe has enacted ordinances pursuant to which it has authorized one or more on-reservation tobacco outlets.[16] These ordinances have been approved by the Secretary of the Interior; and the dealer at each tobacco outlet is a federally licensed Indian trader. All three Tribes use federally restricted tribal funds[17] to purchase cigarettes from out-of-state dealers.[18] The Tribes distribute the cigarettes to the tobacco outlets and collect from the operators of those outlets both the wholesale distribution price and a tax of 40 to 50 cents per carton. The cigarettes remain the property of the Tribe until sale. The taxing ordinances specify that the tax is to be passed on to the ultimate consumer of the cigarettes. From 1972 through 1976, the Colville Tribe realized approximately $266,000 from its cigarette tax; the Lummi Tribe realized $54,000 and the Makah Tribe realized $13,000.

While the Colville, Lummi, and Makah Tribes function as retailers, retaining possession of the cigarettes until their sale to consumers, the Yakima Tribe acts as a wholesaler. It pur-

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[15] The Yakima Indian Reservation was set aside for the Tribe by treaty ratified March 8, 1859. Treaty with the Yakimas, 12 Stat. 951. It encompasses about 1.4 million acres in south-central Washington.

[16] The tribal ordinances regulating the sale, distribution, and taxing of cigarettes are set forth at App. 104, 118, and 111.

[17] The funds are maintained in individual accounts in the Bureau of Indian Affairs agency serving the reservation pursuant to 25 CFR Part 104 (1978). App. 32–34.

[18] These out-of-state wholesalers are also federally licensed Indian traders.

chases cigarettes from out-of-state dealers and then sells them to its licensed retailers. The Tribe receives a markup over the wholesale price from those retailers as well as a tax of 22.5 cents per carton. There is no requirement that this tax be added to the selling price. In 1975, the Yakima Tribe derived $278,000 from its cigarette business.

Indian tobacco dealers make a large majority of their sales to non-Indians—residents of nearby communities who journey to the reservation especially to take advantage of the claimed tribal exemption from the state cigarette and sales taxes. The purchaser saves more than a dollar on each carton, and that makes the trip worthwhile. All parties agree that if the State were able to tax sales by Indian smokeshops and eliminate that $1 saving, the stream of non-Indian bargain hunters would dry up. In short, the Indian retailer's business is to a substantial degree dependent upon his tax-exempt status, and if he loses that status his sales will fall off sharply.

III

We first address our jurisdiction to hear the State's appeal. Two attacks are made upon that jurisdiction, one grounded in the intricacies of the now repealed statute governing three-judge district courts and the other having to do with the timing of the State's appeal.

Under 28 U. S. C. § 1253, a direct appeal lies to this Court from an order granting or denying an injunction in a suit "required by any Act of Congress to be heard and determined by a district court of three judges." At the time the *Yakima* and *Colville* cases were filed, 28 U. S. C. § 2281 (1970 ed.) provided that:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof

> upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges. . . ." [19]

After the State filed its jurisdictional statement in this appeal, the United States moved to dismiss the *Yakima* case on the ground that it was not one required by § 2281 to be heard by a court of three judges and thus did not fall within the grant of appellate jurisdiction in § 1253. Although directed only to the *Yakima* case because that is the only one to which the Government is a party, this challenge is quite clearly germane to the *Colville* case as well.

Section 2281 does not require a three-judge court where a constitutional challenge to a state statute is grounded only in the Supremacy Clause. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 128–129 (1965). In addition, § 2281 is not brought into play by constitutional claims that are "insubstantial," *Goosby* v. *Osser*, 409 U. S. 512, 518 (1973). The United States argues that the substantive tax claims raised by these cases fall into one or the other category, and thus failed to trigger § 2281.[20] Further, the Government continues, the attacks on the State's seizure of cigarettes, while perhaps raising genuine Commerce Clause issues, are not properly characterized as challenges to the constitutionality *of a state statute*. Rather, the Government asserts, they go to the constitutionality of the *result* obtained by the *use* of the statute. We find neither contention persuasive.

The original complaints in these actions contended that the state taxes were unconstitutional under the Indian Com-

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[19] The repeal of this provision in 1976 does not affect its application to these cases. See n. 4, *supra*.

[20] As the Government recognizes, its position in this regard is somewhat anomalous since it was the United States which initially requested a three-judge court in the *Yakima* case. App. 145. At that time the Government seemed to have no doubt that it sought to enjoin the enforcement of a state statute on grounds of its unconstitutionality within the meaning of § 2281.

merce Clause as well as the Supremacy Clause. Relying primarily upon language in footnote 17 in *Moe* v. *Salish & Kootenai Tribes*, 425 U. S., at 481, the United States asserts that the Tribes' Commerce Clause claims were insubstantial.[21] But *Moe* was decided in 1976—long after a three-judge court was convened to hear these cases—and it is thus apparent that footnote 17 alone cannot be dispositive, whatever its precise thrust. There is language in that footnote, however, which suggests that the insubstantiality of Commerce Clause claims such as those before us flows from *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973), and *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973)—both of which were decided before the present suits were filed.[22] We think the United States reads too much into this language. *Goosby* v. *Osser*, *supra*, made it clear that constitutional claims will not lightly be found insubstantial for

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[21] The District Court seems to have found this contention persuasive, 446 F. Supp., at 1350, although it addressed it only briefly. Presumably it saw no need to explore the matter more fully since it was confident that the three-judge requirement had in any event been satisfied by the Tribes' challenges to the State's enforcement measures. *Id.*, at 1350–1351.

[22] Footnote 17 in its entirety reads as follows:

"It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U. S. Const., Art. VI, cl. 2, and not any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine as laid down originally in *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819). If so, then the basis for convening a three-judge court in this type of case has effectively disappeared, for this Court has expressly held that attacks on state statutes raising only Supremacy Clause invalidity do not fall within the scope of 28 U. S. C. § 2281. *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965). Here, however, the District Court properly convened a § 2281 court, because at the outset the Tribe's attack asserted unconstitutionality of these statutes under the Commerce Clause, a not insubstantial claim since *Mescalero* and *McClanahan* had not yet been decided. See *Goosby* v. *Osser*, 409 U. S. 512 (1973)." 425 U. S., at 481.

purposes of § 2281. Indeed, *Goosby* explicitly states that prior decisions are not sufficient to support a conclusion that certain claims are insubstantial unless those prior decisions "inescapably render the claims frivolous." 409 U. S., at 518. We cannot say here that the *Goosby* test has been met. Neither *Mescalero* nor *McClanahan* "inescapably render[s] the [Tribes' Commerce Clause] claims frivolous" because neither holds that that Clause is wholly without force in situations like the present. And even footnote 17 merely rejects the stark and rather unhelpful notion that the Commerce Clause provides an "*automatic* exemptio[n] 'as a matter of constitutional law'" in such cases. (Emphasis added.) It does not take that Clause entirely out of play in the field of state regulation of Indian affairs.

In addition, it seems quite clear that the Tribes' attack on the official seizure of cigarettes bound for the reservations also triggers the three-judge requirement of § 2281. The United States concedes that that attack raised Commerce Clause issues, but maintains that the Tribes' target was not really the state enforcement statutes themselves, but rather the discretionary official conduct undertaken pursuant to those statutes. We have no quarrel with the proposition that the mere fact that executives seek shelter under various state statutes will not necessarily convert a suit to restrain their lawless behavior into a § 2281 case, *Phillips* v. *United States*, 312 U. S. 246, 248–253 (1941). But this is not a situation in which the only connection with state statutes arises when officials accused of taking various ultra vires actions seek to trace their conduct back to vague statutes granting them broad executive discretion. Here the state officials involved were attempting to enforce the state tax laws by using the tools authorized for such enforcement by the state legislature. They manifested an intention to continue to use those tools for that purpose. And it is those tools, as applied to cigarettes in Indian commerce, which the Tribes chal-

lenged.[23] We hold that this suffices to bring these cases within § 2281.

The other jurisdictional question postponed in 1979 is relevant only to the *Colville* case. It concerns the timeliness under 28 U. S. C. § 2101 (b) of the State's appeal from the District Court's resolution of the motor-vehicle-tax and assumption-of-jurisdiction issues. Basically, the problem is this: the notice of appeal on these two issues was filed more than 60 days after the District Court's decision, but within 60 days of the denial of a state motion for partial new trial—a motion that was not addressed to the motor-vehicle-tax and assumption-of-jurisdiction issues. The question is whether a motion for partial new trial renders nonfinal the District Court's holding on *all* issues between the parties, or merely renders nonfinal the disposition of those issues actually raised in the new trial motion. If the former, the State's notice of appeal on the vehicle-taxes and assumption-of-jurisdiction issues was timely. If the latter, that notice was filed out of time and to that extent the appeal is jurisdictionally time-barred.[24]

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[23] See *Turner* v. *Fouche*, 396 U. S. 346, 354, n. 10 (1970). See also *Department of Employment* v. *United States*, 385 U. S. 355 (1966); *Query* v. *United States*, 316 U. S. 486, 490 (1942).

[24] The actual chronology was as follows: On May 10, 1978, the District Court entered its final order. On May 22, the State filed a motion for partial new trial on the cigarette and sales tax issues. On July 12, while that motion was pending, the State filed a notice of appeal raising the motor-vehicle-excise-tax and assumption-of-jurisdiction issues. On July 17, the motion for partial new trial was denied; and on August 14, the State filed a notice of appeal on the sales and cigarette tax issues. On September 8, the State filed an amended notice of appeal raising all relevant issues. The July 12 notice of appeal was filed more than 60 days after the original District Court order. Accordingly, under 28 U. S. C. § 2101 (b), it was out of time. The notice of August 14 and the amended notice of September 8, however, were filed within 60 days of the District Court's denial of the motion for partial new trial. It seems clear that the filing of that motion rendered nonfinal the disposition of all covered

We think that the filing of a motion for partial new trial in these circumstances must have rendered nonfinal the disposition of all issues between the parties. A contrary conclusion would serve no useful purpose. At best it would make little difference save to force future appellants to include in what might otherwise have been narrow motions for partial new trials a blanket request for reconsideration of all issues. And at worst it would be a procedural pitfall, devoid of any sound supporting rationale but capable of occasionally tripping those who failed to insert a line of boilerplate or file a redundant slip of paper. Accordingly, we hold that the appeal of the District Court's vehicle-tax and assumption-of-jurisdiction holdings is properly before us, and we turn to the merits.

IV

A

In *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), we considered a state taxing scheme remarkably similar to the cigarette and sales [25] taxes at issue in the present cases. Montana there sought to impose a cigarette tax on sales by smokeshops operated by tribal members and located on leased trust lands within the reservation, and sought to require the smokeshop operators to collect the tax. We upheld the tax, insofar

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issues—if not, one seeking a partial new trial would have to jeopardize his right to appeal. *Communist Party of Indiana* v. *Whitcomb*, 414 U. S. 441, 445–446 (1974); *Department of Banking* v. *Pink*, 317 U. S. 264, 266 (1942). Thus, the only remaining question is whether the motion for partial new trial also suspended the finality of the District Court's disposition of issues not covered by that motion.

[25] We are here generally concerned only with the application of Washington's retail sales tax to *cigarette* sales. The District Court upheld the sales tax as applied to sales of other goods to non-Indians, and the Tribes do not contest that holding. We do, however, consider the question of noncigarette sales when we discuss (1) whether Washington can tax purchases by Indians not members of the governing Tribe, and (2) whether Washington's recordkeeping requirements are valid.

as sales to non-Indians were concerned,[26] because its legal incidence fell on the non-Indian purchaser. Hence, "the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax." *Id.*, at 482 (emphasis in original). We upheld the collection requirement, as applied to purchases by non-Indians, on the ground that it was a "minimal burden" designed to aid the State in collecting an otherwise valid tax. *Id.*, at 483.

Moe establishes several principles relevant to the present cases. The State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians.[27] And the State may impose at least "minimal" burdens on the Indian retailer to aid in enforcing and collecting the tax. There is no automatic bar, therefore, to Washington's extending its tax and collection and record-keeping requirements onto the reservation in the present cases.

Although it narrows the issues in the present cases, *Moe* does not definitively resolve several important questions. First, unlike in *Moe*, each of the Tribes imposes its own tax on cigarette sales, and obtains further revenues by participating in the cigarette enterprise at the wholesale or retail level. Second, Washington requires the Indian retailer to keep detailed records of exempt and nonexempt sales in addition to simply precollecting the tax. *Moe* expressed no opinion

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[26] We struck down the tax as applied to sales to Indians. 425 U. S., at 475–481.

[27] The United States reads *Moe* too parsimoniously in asserting its inapplicability to cases, such as the present ones, in which the economic impact on tribal retailers is particularly severe. *Moe* makes clear that the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all.

regarding the "complicated problems" of enforcement that distinctions between exempt and nonexempt purchasers might entail. *Id.*, at 468, n. 6. Third, *Moe* left unresolved the question of whether a State can tax purchases by on-reservation Indians not members of the governing tribe, as Washington seeks to do in the present cases. *Id.*, at 480–481, n. 16. Finally, unlike in *Moe*, Washington has seized, and threatens to continue seizing, shipments of unstamped cigarettes en route to the reservations from wholesalers outside the State. We address each of these questions.

B

(1)

At the outset, the State argues that the Colville, Makah, and Lummi Tribes have no power to impose their cigarette taxes on nontribal purchasers.[28] We disagree. The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. Cf. *United States* v. *Wheeler*, 435 U. S. 313 (1978).

The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power. Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest, 17 Op. Atty. Gen. 134 (1881); 7 Op.

[28] The incidence of the Colville, Lummi, and Makah taxes falls on the cigarette purchaser, since the tribal ordinances specify that the tax is to be passed on to the ultimate consumer. The Yakima ordinance, in contrast, does not require that the tax be added to the selling price, and the incidence of the Yakima tax therefore does not fall on the purchaser. The State's challenge is directed only at the Colville, Lummi, and Makah taxes.

Atty. Gen. 174 (1855), including jurisdiction to tax, 23 Op. Atty. Gen. 214 (1900); *Powers of Indian Tribes*, 55 I. D. 14, 46 (1934). According to the Solicitor of the Department of the Interior:

> "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." *Ibid.* (emphasis added).

Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity. *Buster* v. *Wright*, 135 F. 947, 950 (CA8 1905), appeal dism'd, 203 U. S. 599 (1906); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F. 2d 89 (CA8 1956); cf. *Morris* v. *Hitchcock*, 194 U. S. 384, 393 (1904). No federal statute cited to us shows any congressional departure from this view. To the contrary, authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U. S. C. § 476. In these respects the present cases differ sharply from *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978), in which we stressed the shared assumptions of the Executive, Judicial, and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians.

Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal

consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. See *id.*, at 208–210; *United States* v. *Wheeler*, *supra*, at 326. In the present cases, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation. And even if the State's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.

(2)

The Tribes contend that their involvement in the operation and taxation of cigarette marketing on the reservation ousts the State from any power to exact its sales and cigarette taxes from nonmembers purchasing cigarettes at tribal smokeshops. The primary argument is economic. It is asserted that smokeshop cigarette sales generate substantial revenues for the Tribes which they expend for essential governmental services, including programs to combat severe poverty and underdevelopment at the reservations. Most cigarette purchasers are outsiders attracted onto the reservations by the bargain prices the smokeshops charge by virtue of their claimed exemption from state taxation. If the State is permitted to impose its taxes, the Tribes will no longer enjoy any competitive advantage vis-à-vis businesses in surrounding areas. Indeed, because the Tribes themselves impose a tax on the transaction, if the state tax is also collected the price charged will necessarily be higher and the Tribes will be placed at a competitive *disadvantage* as compared to businesses elsewhere. Tribal smokeshops will lose a large percentage of their cigarette sales and the Tribes will forfeit substantial revenues. Because of this economic impact, it is argued, the state taxes are (1) pre-empted by federal statutes regulating Indian affairs; (2) inconsistent with the principle of tribal self-government; and (3) invalid under "negative implications" of the Indian Commerce Clause.

It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. Cf. *Moe* v. *Salish & Kootenai Tribes*, 425 U. S., at 475–481; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973). What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

The federal statutes cited to us, even when given the broadest reading to which they are fairly susceptible, cannot be said to pre-empt Washington's sales and cigarette taxes. The Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, the Indian Financing Act of 1974, 88 Stat. 77, 25 U. S. C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U. S. C. § 450 *et seq.*, evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State. The Indian traders statutes, 25 U. S. C. § 261 *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange, see *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965), but no similar intent is evident

with respect to sales by Indians to nonmembers of the Tribe. The Washington Enabling Act, 25 Stat. 676, reflects an intent that the State not tax reservation lands or income derived therefrom, but the present taxes are assessed against nonmembers of the Tribes and concern transactions in personalty with no substantial connection to reservation lands. The relevant treaties, Treaty of Point Elliott, 12 Stat. 927 (1855) (Lummi Tribe); Treaty with the Makah Tribe, 12 Stat. 939 (1855); Treaty with the Yakimas, 12 Stat. 951 (1855), can be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter; but purchasers entering the reservation are not the State's agents and any agreements which they might make cannot bind it. Finally, although the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so, cf. *Fisher* v. *District Court*, 424 U. S. 382, 390 (1976) (*per curiam*); *United States* v. *Mazurie*, 419 U. S. 544 (1975), we do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.

Washington does not infringe the right of reservation Indians to "make their own laws and be ruled by them," *Williams* v. *Lee*, 358 U. S. 217, 220 (1959), merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving. The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 179. While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value gen-

erated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. As we have already noted, Washington's taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations.

It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. See *Moe* v. *Salish & Kootenai Tribes, supra,* at 481, n. 17. That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce. But Washington's taxes are applied in a nondiscriminatory manner to all transactions within the State. And although the result of these taxes will be to lessen or eliminate tribal commerce with nonmembers, that market existed in the first place only because of a claimed exemption from these very taxes. The taxes under consideration do not burden commerce that would exist on the reservations without respect to the tax exemption.

We cannot fault the State for not giving credit on the amount of tribal taxes paid. It is argued that if a credit is not given, the tribal retailers will actually be placed at a competitive disadvantage, as compared to retailers elsewhere, due to the overlapping impact of tribal and state taxation. While this argument is not without force, we find that the Tribes have failed to demonstrate that business at the smokeshops would be significantly reduced by a state tax without a credit as compared to a state tax with a credit. With a credit, prices at the smokeshops would presumably be roughly the same as those off the reservation, assuming that the Indian enterprises are operated at an efficiency similar to that of businesses

elsewhere; without a credit, prices at smokeshops would exceed those off the reservation by the amount of the tribal taxes, about 40 to 50 cents per carton for the Lummi, Makah, and Colville Tribes, and 22.5 cents per carton for the Yakima Tribe. It is evident that even if credit were given, the bulk of the smokeshops' present business would still be eliminated, since nonresidents of the reservation could purchase cigarettes at the same price and with greater convenience nearer their homes and would have no incentive to travel to the smokeshops for bargain purchases as they do now. Members of the Tribes, of course, would be indifferent to whether a credit were given because under *Moe* they are immune from any state tax, whether credited or not. Some nonmembers of the Tribes living on the reservations would possibly travel elsewhere to purchase cigarettes if a state credit were not given, and smokeshop business would to this extent be decreased as compared to the situation under a credited tax. But the Tribes have not shown whether or to what extent this would be the case, and we cannot infer on the present record that by failing to give a credit Washington impermissibly taxes reservation value by deterring sales that, if credit were given, would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the cigarettes.

A second asserted ground for the invalidity of the state taxes is that they somehow conflict with the Tribes' cigarette ordinances and thereby are subject to pre-emption or contravene the principle of tribal self-government. This argument need not detain us. There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. Although taxes can be used for distributive or regulatory purposes, as well as for raising revenue, we see no nonrevenue purposes to the tribal taxes at issue in these cases, and, as already noted, we perceive no intent on the part of Congress to authorize the Tribes to pre-empt otherwise valid state taxes. Other provi-

sions of the tribal ordinances do comprehensively regulate the marketing of cigarettes by the tribal enterprises; but the State does not interfere with the Tribes' power to regulate tribal enterprises when it simply imposes its tax on sales to nonmembers. Hence, we perceive no conflict between state and tribal law warranting invalidation of the State's taxes.

C

We recognized in *Moe* that if a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax. The simple collection burden imposed by Washington's cigarette tax on tribal smokeshops is legally indistinguishable from the collection burden upheld in *Moe*, and we therefore hold that the State may validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe.

The state sales tax scheme requires smokeshop operators to keep detailed records of both taxable and nontaxable transactions. The operator must record the number and dollar volume of taxable sales to nonmembers of the Tribe. With respect to nontaxable sales, the operator must record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales. In addition, unless the Indian purchaser is personally known to the operator he must present a tribal identification card.

The District Court struck down all recordkeeping requirements with respect to cigarette sales, because it found that no cigarette sales were taxable. With respect to sales of items other than cigarettes, the District Court found no record evidence "as to whether the record keeping requirements, as promulgated, are or are not reasonably necessary to ensure payment of lawful taxes." 446 F. Supp., at 1373. The District Court upheld the requirements insofar as they pertained to taxable sales, but struck them down with respect to non-

taxable sales on the ground that the State had not met its burden of showing that the regulation was reasonably necessary to ensure payment of taxes which it had power to impose.

Contrary to the District Court, we find the State's recordkeeping requirements valid *in toto*. The Tribes, and not the State as the District Court supposed, bear the burden of showing that the recordkeeping requirements which they are challenging are invalid. The District Court made the factual finding, which we accept, that there was no evidence of record on this question. Applying the correct burden of proof to the District Court's finding, we hold that the Tribes have failed to demonstrate that the State's recordkeeping requirements for exempt sales are not reasonably necessary as a means of preventing fraudulent transactions.

D

The State asserts the power to apply its sales and cigarette taxes to Indians resident on the reservation but not enrolled in the governing Tribe. The issue arose in the *Yakima* case in the wake of the District Court's determination that the state retail sales tax could be applied to the purchase by non-Indians of goods other than cigarettes. It was, of course, quite clear after *Moe* and *McClanahan* that the sales tax could not be applied to similar purchases by tribal members, but the State argued that this exemption should not extend to nonmembers of the Tribe. Relying in part on the lower court opinion in *Moe, Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1312 (Mont. 1975) (three-judge court), the District Court rejected the contention. 446 F. Supp., at 1371–1372. This Court did not reach the question in *Moe* because Montana failed to raise it on appeal. We do reach it now, and we reverse.

Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe. We do not so read the Major Crimes Act,

18 U. S. C. § 1153, which at most provides for federal-court jurisdiction over crimes committed by Indians on another Tribe's reservation. Cf. *United States* v. *Antelope*, 430 U. S. 641, 646–647, n. 7 (1977). Similarly, the mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U. S. C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.

Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

E

Finally, the State contends that it has the power to seize unstamped cigarettes as contraband if the Tribes do not cooperate in collecting the State's taxes. The State in fact seized shipments traveling to the reservations from out-of-state wholesalers before being enjoined from doing so by the District Court, and it has declared its intention to continue such seizures if successful in this litigation. The Tribes contest this power, noting that because sales by wholesalers to the tribal businesses are concededly exempt from state taxation, no state tax is due while the cigarettes are in transit.

We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures. Although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which

the State has validly imposed. It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries. Cf. *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973). By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests.

Washington further contends that it may enter onto the reservations, seize stocks of cigarettes which are intended for sale to nonmembers, and sell these stocks in order to obtain payment of the taxes due. However, this question, which obviously is considerably different from the preceding one, is not properly before us. The record does not disclose that the State has ever entered the reservations to seize cigarettes because of the Tribes' failure to collect the taxes due on sales to nonmembers, or ever threatened to do so except in papers filed in this litigation. Indeed, the State itself concedes that "it may very well be that this Court will find it unnecessary to rule on this aspect of the appeal." Brief for Appellants in No. 78–630, p. 110. We therefore express no opinion on the matter.

V

The next issue concerns the challenge in the *Colville* case to the Washington motor vehicle and mobile home, camper and travel trailer taxes. Although not identical, these taxes are quite similar. Each is denominated an excise tax for the "privilege" of using the covered vehicle in the State, each is assessed annually at a certain percentage of fair market value, and each is sought to be imposed upon vehicles owned by the Tribe or its members and used both on and off the reservation.[29]

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[29] In the wake of *McClanahan* v. *Arizona State Tax Comm'n* and *Moe*, the State does not claim that it can impose these taxes upon vehicles used wholly within the reservation. Brief for Appellants in No. 78–630, p. 111, and n. 77.

Once again, our departure point is *Moe*. There we held that Montana's personal property tax could not validly be applied to motor vehicles owned by tribal members who resided on the reservation. 425 U. S., at 480–481. The vehicles Montana attempted to tax were apparently used both on and off the reservation,[30] and the tax was assessed annually at a percentage of market value of the vehicles in question. Thus, the only difference between the taxes now before us and the one struck down in *Moe* is that these are called excise taxes and imposed for the privilege of using the vehicle in the State, while the Montana tax was labeled a personal property tax. The State asserts that this difference mandates a different result. In *Moe*, it argues, the District Court concluded that the taxable event was "the ownership of a motor vehicle as of January 1 of each year," [31] and that event took place on the reservation. Accordingly, under *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973), Montana was without authority to impose its tax. In the present case, the State continues, the taxable event is the use *within the State* of the vehicle in question. Thus, we are told, the *McClanahan* principle is inapplicable and the tax should be upheld under *Mescalero Apache Tribe* v. *Jones*, *supra*.

We do not think *Moe* and *McClanahan* can be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accomplish what *Moe* held was prohibited. Had Washington tailored its tax to the amount of actual off-reservation use, or otherwise varied some-

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[30] *Moe* did not focus upon vehicle use at all. The District Court opinion in that case, however, indicates that some of the vehicles to which Montana sought to apply its tax were used both on and off the reservation. *Confederated Salish and Kootenai Tribes* v. *Montana*, 392 F. Supp. 1325, 1328–1329 (Mont. 1975) (three-judge court) (Smith, J., concurring in part and dissenting in part).

[31] *Id.*, at 1327, citing the Montana statute, Mont. Rev. Codes Ann. § 84–406 (2) (Supp. 1974).

thing more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had.

VI

Finally, we come to the challenge by the Colville, Lummi, and Makah Tribes to the State's assumption of civil and criminal jurisdiction over them. The District Court found that assumption unlawful as regards the Makah and Lummi Reservations and lawful as regards the Colville Reservation. 446 F. Supp., at 1366–1367. The State challenges the former findings.

All parties apparently recognize that this issue is controlled by the intervening decision in the State's favor in *Washington* v. *Yakima Indian Nation*, 439 U. S. 463 (1979). There a pattern of jurisdiction identical to those created on the Makah and Lummi Reservations was upheld, and the holding of the Court of Appeals for the Ninth Circuit on which the District Court in the present case relied for its conclusion that such patterns are unconstitutional was reversed. We therefore uphold the State's assumption of jurisdiction over the Makah and Lummi Reservations.[32] Accordingly, the judgments of the District Court are

Reversed in part and affirmed in part.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I agree with the Court's analysis of the jurisdictional questions posed in these cases, as well as with its treatment of the

[32] In No. 78–60, *Confederated Tribes of the Colville Indian Reservation et al.* v. *Washington et al.*, which is pending on appeal, the Colville Tribe appeals from so much of the District Court's judgment as reflects the holding that Washington's assumption of total jurisdiction over that Tribe's reservation was lawful. See 446 F. Supp., at 1366–1367. The Colville Tribe challenges that holding on grounds (1) that Washington could not assume jurisdiction without amending its Constitution and (2) that the assumption of total jurisdiction over only selected reservations violates the

Washington motor vehicle, mobile home, camper and travel trailer taxes and its disposition of the assumption-of-jurisdiction issue. Accordingly, I join in their entirety Parts I, II, III, V, and VI of the Court's opinion. I also agree with Part IV insofar as it holds that the Colville, Makah, and Lummi Tribes have the power to impose their cigarette taxes on nontribal purchasers (Part IV–B (1)). As the Court points out, the power to tax on-reservation transactions that involve a tribe or its members is a "fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication . . . ." *Ante*, at 152. Recognition of that fundamental attribute, however, leads me to disagree with much of the balance of the Court's Part IV. In my view, the State of Washington's cigarette taxing scheme should be invalidated both because it undermines the Tribes' sovereign authority to regulate and tax the distribution of cigarettes on trust lands and because it conflicts with tribal activities and functions that have been expressly approved by the Federal Government.

I

I begin with a somewhat general overview. While they are sovereign for some purposes, it is now clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries.[1] The result has been to blur the

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Equal Protection Clause. *Washington* v. *Yakima Indian Nation*, 439 U. S. 463 (1979), disposes of the first contention, *id.*, at 493, and makes clear that the second must fail if the assumption of jurisdiction is rationally related to some valid state purpose, *id.*, at 500–502. We find the pattern of jurisdiction in the present case rational: The Colville Tribe consented in 1965 to the State's assumption of jurisdiction over it, and the State has assumed total jurisdiction only over tribes that have so consented. The presence or absence of tribal consent is a rational basis for distinguishing among reservations, and there is thus no constitutional infirmity. Accordingly, the judgment is in this respect affirmed.

[1] The starkest territorial conception of Indian sovereignty was sketched by Mr. Chief Justice Marshall in *Worcester* v. *Georgia*, 6 Pet. 515,

boundary between state and tribal authority. A few guideposts do exist, however. First, in the absence of tribal consent state law does not reach on-reservation conduct involving only Indians. Thus we have held that tribal courts have exclusive jurisdiction over adoption proceedings involving the on-reservation conduct of tribal members, *Fisher* v. *District Court*, 424 U. S. 382 (1976); that States cannot apply their income taxes to the receipts derived by reservation Indians from reservation sources, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973); and that States may not levy cigarette taxes on on-reservation sales to reservation Indians or impose personal property taxes on property owned by such Indians, *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 480–481 (1976).

Second, there is a significant territorial component to tribal power. Thus state taxes on the off-reservation activities of Indians are permissible, *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973), and tribal laws will often govern the on-reservation conduct of non-Indians. *Williams* v. *Lee*, 358

557–561 (1832). An Indian reservation, he stated, was "a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force . . . ." See F. Cohen, Handbook of Federal Indian Law 122 (1942). *Williams* v. *Lee*, 358 U. S. 217, 219 (1959), noted that this view had been "modified . . . in cases where essential tribal relations were not involved." *Kake Village* v. *Egan*, 369 U. S. 60, 71–75 (1962), noted a shift as well. And *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 172 (1973), observed that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction." Rather, *McClanahan* concluded, sovereignty is better seen as a "backdrop against which the applicable treaties and federal statutes must be read." *Ibid.* In a similar vein, *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 208 (1978), recognized that Indian tribes are "prohibited from exercising both those powers of autonomous States that are expressly terminated by Congress and those powers 'inconsistent with their status.'" (Emphasis and citations omitted.) Still, *United States* v. *Wheeler*, 435 U. S. 313, 322–326 (1978), emphasized the sovereign nature of tribal authority over Indians. See also *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973); *Antoine* v. *Washington*, 420 U. S. 194, 201–203 (1975).

U. S. 217 (1959). See also *United States* v. *Mazurie*, 419 U. S. 544, 557–558 (1975).[2]

Third, where it is necessary to resolve a conflict between state and tribal authority over on-reservation conduct involving Indians and non-Indians, a relatively particularistic look at the interests of State and tribe and the federal policies that govern relations with Indian tribes is appropriate. We have concluded, for example, that a tribe lacks jurisdiction to try a non-Indian for a crime, *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 208 (1978), but that a State may not resolve a dispute arising out of on-reservation transactions between an Indian purchaser and a non-Indian seller, *Williams* v. *Lee*, *supra*, at 219, or tax the gross receipts of a federally licensed retail trading post that deals on the reservation with reservation Indians, *Warren Trading Post Co.* v. *Arizona State Tax Comm'n*, 380 U. S. 685 (1965).

And fourth, the preceding results flow from an intricate web of sources including federal treaties and statutes, the broad policies that underlie those federal enactments, and a presumption of sovereignty or autonomy that has roots deep in aboriginal independence. The prevalent mode of analysis is one of pre-emption. It takes as its starting point the exclusive power of the Federal Government to regulate Indian tribes and proceeds to bound state power where necessary to give vitality to the federal concerns at stake. *Bryan* v.

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[2] This territorial component is also suggested by recent statutes like the Clean Air Act Amendments of 1977, 91 Stat. 685, 735, which provide that "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes" may be redesignated for air quality purposes "only by the appropriate Indian governing body." A similar note is sounded in the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 523. In addition, a geographical or territorial source for Indian authority may be found in the Washington Enabling Act, 25 Stat. 676, § 4, by which the State was required to disclaim "all right and title" to lands "owned or held by any Indian or Indian tribes" and to agree that such lands "shall remain under the absolute jurisdiction and control of the Congress. . . ."

Itasca County, 426 U. S. 373, 376, n. 2 (1976). Only rarely does the talismanic invocation of constitutional language or rigid conceptions of state and tribal sovereignty shed light on difficult problems. *Moe*, *supra*, at 481, n. 17; *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 172.

For present purposes, two federal concerns seem especially important. One is the strong and oft-cited policy of encouraging tribal self-government. *United States* v. *Wheeler*, 435 U. S. 313, 322–326 (1978); *Fisher* v. *District Court*, *supra*, at 386–388; *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 179; *Williams* v. *Lee*, *supra*, at 219–220. And the other is a complementary interest in stimulating Indian economic and commercial development. Both found expression in the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.*,[3] and are manifest in more recent statutes as well.[4] They are,

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[3] See *Mescalero Apache Tribe* v. *Jones*, 411 U. S., at 151–152. There we noted that the "intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Id.*, at 152, quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). The Reorganization Act itself contains a number of provisions that demonstrate Congress' concern with encouraging Indian economic development. See 25 U. S. C. §§ 469, 470, and 477. See also *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 59–60 (1978).

[4] See the Indian Self-Determination and Education Assistance Act of 1975, 25 U. S. C. § 450 *et seq.*, and the Indian Financing Act of 1974, 25 U. S. C. § 1451 *et seq.* Section 2 of the latter statute states as follows:

"It is hereby declared to be the policy of Congress to provide capital . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 88 Stat. 77.

Adherence to the policies underlying the Reorganization Act has not been without some interruption. The Termination Acts of the 1950's, see, *e. g.*, 25 U. S. C. §§ 564, 721–728, 741–760, and 891–901 (1958 ed.) seem to have signalled a congressional urge to pursue an assimilationist policy somewhat

I believe, of central importance in analyzing any conflict of state and tribal law.

II

With this as background, I turn to the particular problem at hand. Like the Court, I begin with *Moe, supra,* which considered a state cigarette tax similar to the one at issue here. There we started with the observation that the tax itself was "concededly lawful"—it neither fell upon tribal members nor impinged on tribal functions. 425 U. S., at 483. The key problem, as we saw it, was one of enforcement: Could the State of Montana require the Indian seller to collect a tax validly imposed on the non-Indian purchaser? We determined that the burden of collection was minimal and noted that it would in no sense "frustrat[e] tribal self-government." [5] Accordingly, we held that it could be imposed to prevent wholesale tax avoidance by non-Indian purchasers.

As the Court points out, *Moe* does suggest a number of limits upon Indian sovereignty in general and the federal interests in tribal self-government and economic growth in particular: It permits state law to come on the reservation in the form of a tax and collection requirement, and it upholds the imposition of a tax that will undoubtedly hurt Indian retailing activities by depriving tribal smokeshops of a competitive edge.

But while in *Moe* the cigarette business was largely a private operation, the Tribes involved in these cases have adopted comprehensive ordinances regulating and taxing the distribution of cigarettes by on-reservation shops. Phrased differently, these Tribes are acting in federally sanctioned and

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akin to the approach that was dominant prior to the Reorganization Act. See generally *Menominee Tribe* v. *United States,* 391 U. S. 404 (1968). But present policy "appears to be returning to a focus upon strengthening tribal self-government." *Bryan* v. *Itasca County,* 426 U. S. 373, 389, n. 14 (1976).

[5] *Moe,* 425 U. S., at 483, citing *Williams* v. *Lee,* 358 U. S., at 219–220.

encouraged ways—they are raising governmental revenues, establishing commercial enterprises, and struggling to escape from "'a century of oppression and paternalism.'" *Mescalero Apache Tribe* v. *Jones*, 411 U. S., at 152, quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). As I see it, that difference has three important consequences. First, it means that in this case the sharp drop in cigarette sales that would result from imposition of the state tax will reduce revenues not only of individual Indian retailers, but also of the Tribes themselves as governmental units. Second, it means that a decision permitting application of the state tax would place Indian goods at an actual competitive *disadvantage* as compared to non-Indian ones because the former would have to bear two tax burdens while the latter bore but one. And third, it leads to an actual conflict of jurisdiction and sovereignty because imposition of the Washington tax would inject state law into an on-reservation transaction which the Indians have chosen to subject to their own laws.

The Court in effect concludes that these consequences are insignificant. The first, it suggests, is undercut by *Moe*, which made clear that Indian retailers have no absolute right to market their tax-exempt status. The second is too speculative—"the Tribes have failed to demonstrate that business at the smokeshops would be significantly reduced by a state tax without a credit as compared to a state tax with a credit." *Ante*, at 157. And the third "need not detain us" because "[t]here is no direct conflict between the state and tribal schemes. . . ." *Ante*, at 158.

I do not agree. Whatever their individual force, I think that in combination these three consequences bring the Washington taxes into sharp conflict with important federal policies. Perhaps most striking is the fact that a rule permitting imposition of the state taxes would have the curious effect of making the federal concerns with tribal self-government and commercial development inconsistent with one another. In essence, tribes are put to an unsatisfactory choice. They are

free to tax sales to non-Indians, but doing so will place a burden upon such sales which may well make it profitable for non-Indian buyers who are located on the reservation to journey to surrounding communities to purchase cigarettes.[6] Or they can decide to remain competitive by not taxing such sales, and in the process forgo revenues urgently needed to fill governmental coffers. Commercial growth, in short, can be had only at the expense of tax dollars. And having to make that choice seriously intrudes on the Indians' right "to make their own laws and be ruled by them," *Williams* v. *Lee*, 358 U. S., at 219–220.[7]

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[6] This problem was entirely absent in *Moe*. Nothing in the result there disfavored the purchase of Indian goods. Rather, imposition of the state tax on non-Indians simply created a situation in which persons were encouraged to buy cigarettes on the basis of factors other than tax benefits and avoidance—factors like geographical location and convenience. In the present situation, the state tax actually tips the balance against the Indians.

[7] It might be argued that the choice I describe is entirely commonplace—that in making its taxing decisions every governmental unit is required to balance its revenue needs against the economic impact of the taxes it considers. In one sense, this is quite true: If one State has a very low sales tax, a neighboring State's ability to impose a higher one may as a practical matter be impaired. In some circumstances, it can cope with this situation by imposing a complementary tax on the in-state use of goods purchased elsewhere. *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551, 555 (1977). And in others there will exist no efficacious way of collecting such a tax. Whatever the case, however, the two States will face each other across their common border with equal arsenals.

I think the present situation is readily distinguishable for the simple reason that Indian reservations are not States. This has two sorts of consequences. First, it means the equality noted in the preceding paragraph is absent. *Moe* holds that sellers on an Indian reservation may be required to collect state taxes on sales to non-Indians that occur entirely on the reservation. Yet it is highly unlikely that the Tribes in these cases could require sellers elsewhere in Washington to collect tribal taxes. And second, Indian Tribes, while less autonomous than States in important respects, are the special beneficiaries of certain federal concerns and policies. As a result,

The Court provides no satisfactory explanation of why the State is free to put the Tribes to such a choice. Rather, it characterizes the tribal business as an effort to market a tax exemption and proceeds to label that effort illegitimate and beyond the reasonable bounds of any federally protected tribal right. Yet that line of argument could at most justify a state tax which through some sort of credit mechanism ensures that the location of cigarette purchases is independent of state and tribal taxing schemes—it does not support a rule that the State may tax all on-reservation sales to non-Indians regardless of tribal taxes.[8] Nor is the Court's argument saved by the contention that the Tribes have failed to prove that the combination of these particular tribal and state taxes will cause Indian smokeshops to lose volume that would otherwise be theirs. The fact is that the Court today permits the State to enact a tax without risking any attendant loss of business for its retailers while the Tribes must court economic harms when they enact taxes of their own. That result erodes the Tribes' sovereign authority and stands the special federal solicitude for Indian commerce and governmental autonomy on its head.

The conflict with federal law is particularly evident on the present facts because the Secretary of the Interior—acting pursuant to lawful regulations—has approved the tribal taxing and regulatory schemes at issue here. That approval, and the federal policies which underlie it, both enhances tribal authority and ousts inconsistent state law. Cf. *Fisher* v.

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the tradeoffs and frictions that may be inevitable in the state-state context demand special scrutiny in the state-reservation context. Tribes may lack the tools needed to protect themselves, and protecting them is an important federal concern. Cf. *Morton* v. *Mancari*, 417 U. S. 535, 551–555 (1974).

[8] See *Mescalero Apache Tribe* v. *Jones*, 411 U. S., at 152 (quoting legislative history to the effect that Indians should be able to "enter the white world on a footing of equal competition").

District Court, 424 U. S. 382 (1976); *United States* v. *Mazurie*, 419 U. S. 544 (1975).

The Court draws support for its result from the suggestion that a decision invalidating these taxes would give the Tribes *carte blanche* to establish vast tax-exempt shopping centers dealing in every imaginable good. I think these fears are substantially overdrawn. *Moe* made clear that Indians do not have an absolute entitlement to achieve some particular sales volume by passing their tax-exempt status to non-Indian customers, and I do not question that conclusion today. I would simply hold that the State may not impose a tax that forces the Tribes to choose between federally sanctioned goals and places their goods at an actual competitive disadvantage. Nothing in such a holding would emasculate state taxing authority or bring the specter of enormous tribal tax havens closer to reality. On the contrary, I am confident that the State could devise a taxing scheme without the flaws which mar the present one.

In sum, I would hold these taxes impermissible and save for another day the question of what sorts of less intrusive measures a State may take to protect its tax base and avoid the parade of horribles alluded to by the Court.

III

Because I would hold the state cigarette taxes invalid, I would not reach the bulk of the recordkeeping and enforcement issues addressed by the Court in Parts IV–C and IV–E of its opinion. Indeed, since the District Court failed to discuss most of those issues, I am startled that the majority proceeds to address and decide them rather than remanding for the views of that court. In my judgment, only one relatively narrow recordkeeping issue ought be addressed at this time, and that concerns the District Court's holding that the State could not require the Tribes to keep records of exempt sales to facilitate collection of valid taxes on nonexempt sales. 446 F. Supp. 1339, 1358–1359, 1373. The District Court

found the record in this case inadequate to show any need for such documentation. The Court, however, sees this as no obstacle to upholding the requirement. I disagree. The State has no direct power over exempt sales, and I see no reason why it should be permitted to require Indians to keep records of such sales absent some showing of necessity or utility. In consequence, I would either affirm the District Court in this regard or remand so that the record may be supplemented.

For the foregoing reason, I dissent as to Parts IV–B (2), IV–C, and IV–E.

MR. JUSTICE STEWART, concurring in part and dissenting in part.

I join all but Part IV–B (2) and Part V of the Court's opinion. My disagreement with Part V is for the reasons stated in Part III of MR. JUSTICE REHNQUIST's separate opinion. My disagreement with Part IV–B (2) stems from the belief that the State of Washington cannot impose the full combined measure of its cigarette and sales taxes on purchases by nontribal members of cigarettes from tobacco outlets on the Colville, Lummi, and Makah Reservations.

In *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 481–483, the Court held that a State has the power to tax sales of cigarettes to non-Indians by Indian tobacco outlets, despite the exemptions from state taxes possessed by an Indian tribe and its members themselves. The State may exert this power, according to *Moe*, even if it thereby deprives the tribe or the enterprises the tribe operates of substantial revenues. Cf., *Thomas* v. *Gay*, 169 U. S. 264. The cigarette and sales tax aspects of this case would, therefore, be wholly controlled by the *Moe* decision, but for the fact that all of the appellee Tribes levy their own cigarette excise taxes on the on-reservation distribution of cigarettes to non-Indians.

It seems clear to me that the appellee Tribes enjoy a power at least equal to that of the State to tax the on-reserva-

tion sales of cigarettes to nontribal members. Those sales are entered into and consummated in places and circumstances subject to the Tribes' protection and control. Furthermore, the taxation of such transactions effectuates recognized federal policies by providing funds for the maintenance and operation of tribal self-government. See generally Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq; McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 179–181; *Williams* v. *Lee,* 358 U. S. 217.

Consequently, when a State and an Indian tribe tax in a functionally identical manner the same on-reservation sales to nontribal members, it is my view that congressional policy conjoined with the Indian Commerce Clause requires the State to credit against its own tax the amount of the tribe's tax. This solution fully effectuates the State's goal of assuring that its citizens who are not tribal members do not cash in on the exemption from state taxation that the tribe and its members enjoy. On the other hand, it permits the tribe to share with the State in the tax revenues from cigarette sales, without at the same time placing the tribe's federally encouraged enterprises at a competitive disadvantage compared to similarly situated off-reservation businesses.

Turning to the case at hand, the approach I have outlined leads me to one conclusion with respect to sales on the Colville, Lummi, and Makah Reservations, and another with respect to sales on the Yakima Reservation. The Colville, Lummi, and Makah Tribes each collect from the operators of on-reservation tobacco outlets a tax of 40 to 50 cents per carton. Although in each case the tax is imposed at the time the cigarettes are distributed by the Tribe to the retail outlets, the pertinent taxing ordinance requires that the tax be passed on to the ultimate consumer. Thus, the actual event taxed, as with the State's cigarette excise tax and general sales tax, is the sale to the nontribal purchaser. Since the Tribe's cigarette tax operates in functionally the same way as do the State's cigarette excise and general sales taxes, I would hold that the

State must credit the tribal tax against the combination of its cigarette excise tax and general sales tax.

The tax imposed by the Yakima Tribe operates differently. The Tribe purchases cigarettes from out-of-state dealers and sells them to its licensed retailers. In connection with this transaction, the Tribe receives from its licensed retailers a tax of 22.5 cents per cigarette carton. Unlike the situation with the Colville, Lummi, and Makah taxes, however, there is no requirement that the tax then be added to the ultimate retail selling price. As a consequence, the event taxed is not the sale to the ultimate cigarette purchaser, and for this reason I believe that the State has no obligation to credit the Indian tax against the combination of its cigarette excise and general sales taxes.

Accordingly, I would vacate the judgment of the District Court insofar as it invalidates *in toto* the imposition of the State's cigarette excise and general sales taxes upon cigarette sales on the Colville, Lummi, and Makah Reservations, and remand the case for further proceedings. I would reverse the judgment of the District Court insofar as it bars the imposition of the State's taxes upon sales of cigarettes on the Yakima Reservation.

MR. JUSTICE REHNQUIST, concurring in part, concurring in the result in part, and dissenting in part.

Since early in the last century, this Court has been struggling to develop a coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation.[1] In recent years, it appeared such a doctrine was well on its way to being established. I write separately to underscore what I think the contours of that doctrine are because I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years.

[1] Much of that developmental history is recounted in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 168–172 (1973).

That doctrine, I had thought, was at bottom a pre-emption analysis based on the principle that Indian immunities are dependent upon congressional intent, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S 463 (1976); *Bryan* v. *Itasca County*, 426 U. S. 373 (1976), at least absent discriminatory state action prohibited by the Indian Commerce Clause. I see no need for this Court to balance the state and tribal interests in enacting particular forms of taxation in order to determine their validity. *Ante*, at 156–157. Absent discrimination, the question is only one of congressional intent. Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress. I concur in the Court's conclusion, however, that the cigarette tax is valid because Congress has not pre-empted state authority to impose the tax.

I

The principles necessary for the resolution of this case are readily derived from our opinions in *McClanahan* and *Mescalero*. *McClanahan* confirmed the trend which had been developing in recent decades towards a reliance on a federal pre-emption analysis. Congress has for many years legislated extensively in the field of Indian affairs. *McClanahan* therefore recognized that the answer to most claims of Indian immunity from state power could be resolved by looking "to the applicable treaties and statutes which define the limits of state power." 411 U. S., at 172.[2]

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[2] The Court in *McClanahan* did not resolve to what extent residual Indian sovereignty in the total absence of federal treaty obligations or legislation still would be recognized. The Court found that "[t]he question is generally of little more than theoretical importance, . . . since in almost all cases federal treaties and statutes define the boundaries of federal and

Despite the expanse of congressional statutes regulating Indian affairs over the years, *McClanahan* foresaw that congressional intent would not always be readily apparent. As a guide to ascertaining that intent in such cases, the Court invoked the tradition of Indian sovereignty as reflected by the earlier decisions of this Court: "The Indian sovereignty doctrine is relevant, . . . not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read." *Ibid.*

McClanahan readily illustrates application of the analysis. The question presented in that case was whether the State of Arizona had jurisdiction to impose a tax on a reservation Indian's income derived solely from reservation sources. The Court first reviewed the "tradition of sovereignty" relevant to this "narrow question." *Id.*, at 168.[3] Historically this Court had found Indians to be exempt from taxes on Indian ownership and activity confined to the reservation and not involving non-Indians.[4] *The Kansas Indians*, 5 Wall. 737 (1867). With this tradition placing reservation-ownership beyond the jurisdiction of the States, the Court undertook a review of the relevant treaties and statutes to determine

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state jurisdiction." 411 U. S., at 172, n. 8. I am convinced that this "residue" of sovereignty is no greater than the freedom from nondiscriminatory taxation held sufficient to protect sovereignty in other areas of constitutionally derived immunities. See n. 9, *infra*. Our opinions have recognized that Indian sovereignty is dependent upon congressional preservation, see *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978), and I decline to use our adjudicatory powers to assume a role properly reserved to Congress.

[3] The Court emphasized that its review of Indian sovereignty was relevant only to this narrow category, *i. e.*, the reservation-derived income of a reservation Indian, and that the Court was expressly not reviewing any situation in which the State attempted to exert its sovereignty over non-Indians undertaking activity on Indian reservations. 411 U. S., at 168.

[4] I use "Indians" throughout this discussion of sovereign immunity to refer to members of a reservation tribe. See *infra*, at 186–187.

whether this tradition of immunity had been altered by Congress.[5] Although no legislation directly provided that Indians were to be immune from state taxation under these circumstances, the enactments reviewed were certainly suggestive of that interpretation. See Arizona Enabling Act, § 20, 36 Stat. 569; the Buck Act, 4 U. S. C. § 105. The Court therefore declined to infer a congressional departure from the prior tradition of Indian immunity absent an express provision otherwise. Thus, as this Court's opinion in *Bryan* v. *Itasca County, supra,* later characterized it, *McClanahan* established a rule against finding that "ambiguous statutes abolish by implication Indian tax immunities." 426 U. S., at 392.

The companion case to *McClanahan, Mescalero Apache Tribe* v. *Jones, supra,* established the corollary principle: When tradition did not recognize a sovereign immunity in favor of the Indians, this Court would recognize one only if Congress *expressly* conferred one. In *Mescalero,* the State of New Mexico asserted the right to impose a tax on the gross receipts of a ski resort owned and operated by an Indian tribe. The resort was located on federal land adjacent to the Indian reservation, was developed under the auspices of the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.,* and was funded with federal money.

The Court in *Mescalero* applied precisely the analysis *McClanahan* adopted. First, the Court reviewed the tradition of sovereignty and found that no immunity for off-reservation activities had traditionally been recognized. See *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575 (1928); *Ward* v. *Race Horse,* 163 U. S. 504 (1896). With that tradition as its backdrop, the Court reviewed the particular statutes relevant to the question of whether or not Congress intended

[5] The Court has explicitly held that attributes of Indian sovereignty are subject to complete defeasance by Congress. *United States* v. *Wheeler, supra,* at 323.

to immunize the Indian enterprise from the state gross receipts tax. The principal Act relevant to the inquiry was the Indian Reorganization Act, since it was the Act under which the tribal enterprise was being conducted. Section 5 of that Act, 25 U. S. C. § 465, provides that the lands acquired under authority of the Act are exempt from state and local taxation. The Court nevertheless refused to read § 5 as broadly conferring an immunity from income as well as property taxes. The Court invoked the well-established rule that " 'tax exemptions are not granted by implication,' " that such exemptions may not rest on " 'dubious inferences,' " but that they must be provided in " 'plain words.' " 411 U. S., at 156, quoting *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598, 606–607 (1943). Despite the clear federal purpose of promoting this tribal economic enterprise, the Court found that no judicial immunities could appropriately be implied.[6]

The subsequent Indian tax immunity cases have been unanimously resolved through application of the corollary principles of construction established in *McClanahan* and *Mescalero*. In *Moe* v. *Salish & Kootenai Tribes*, the Court invalidated attempted state taxation of Indian conduct and property confined to the reservation. The Court found, however, that imposition of a state tax on its non-Indian residents' purchases of cigarettes from Indian sellers on a reservation could not be found to "ru[n] afoul of any congressional enactment dealing with the affairs of reservation Indians." 425 U. S., at 483. In *Bryan* v. *Itasca County*, *supra*, the question was whether the congressional grant of civil jurisdiction to the States conferred by 28 U. S. C. § 1360 was a general grant of power to tax reservation Indians. The tradition, of course, was otherwise and the statute did not specifically state that

[6] In addition, the Court expressed the opinion that congressional policy was not at odds with state taxation since Congress intended that the Indians be prepared to "enter the white world on a footing of equal competition." 411 U. S., at 157.

a repeal of those immunities was intended. Consistent with the principles enunciated in *McClanahan*, the Court reasoned that

> "[t]his omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." 426 U. S., at 381.

Adherence to these principles of construction maximizes the ability of States and tribes to determine the scope of their respective authority without resort to adjudication, and maximizes judicial deference to the legislative forum.

II

Application of these principles readily resolves the validity of the cigarette tax levied by the State. The tax represents a permissible nondiscriminatory exercise of state sovereign authority which has not been pre-empted by Congress. These principles also dispose of the claim of nontribal Indians to an immunity.

A

At issue here is not only Indian sovereignty, but necessarily state sovereignty as well. As a general rule, of course, States are given wide latitude in the exercise of their sovereign powers to tax. In *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 293 (1976), this Court cautioned against invalidating any state taxation absent "the clearest . . . mandate." Here the State attempts to tax its citizens' use of cigarettes purchased in a territory subject to the control of another sovereign.[7] As a general matter, we have repeatedly held that such an exercise of state taxing power is permissible. Here there is no ques-

[7] Indian reservations are not of course subject to the exclusive control of the tribe. The Federal Government and the States also have jurisdiction for some purposes.

tion that the State, by taxing its own non-Indian residents, has "exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred," and "[t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445 (1940). Use tax schemes applicable to purchases in other States, precisely comparable to that in issue here, have long been upheld as a permissible exercise of state taxing power. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *National Geographic Society* v. *California Board of Equalization*, 430 U. S. 551 (1977). Of course in order to collect the tax from the merchant located beyond the territorial jurisdiction of the taxing State, there must also be a relationship between the State and the burdened merchant sufficient to satisfy principles of due process. *National Geographic Society, supra.* After *Moe*, however, the retailers on the tribal reservation cannot gain invalidation of the tax on this basis. 425 U. S., at 482–483. Thus the State has exercised its taxing authority consistent with its sovereign powers and constitutional due process.

An otherwise legitimate exercise of state taxing authority will be illegitimate, of course, if it is sought to be applied in contravention of a constitutional or federal statutory immunity. Indian sovereign immunity from nondiscriminatory taxation is a question of congressional pre-emption. As outlined, we must first identify the backdrop of sovereignty in order to interpret congressional intent in the field. As *McClanahan* implicitly recognized through its citation of authorities, the traditional cases clearly did not find that Indian sovereign immunity was contravened by subjecting tribes to the burdens inherent in state taxation of the reservation activities of non-Indians. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647 (1930); *Utah & Northern R. Co.* v. *Fisher*, 116 U. S. 28 (1885); *Thomas* v. *Gay*, 169 U. S. 264 (1898).

Thomas v. *Gay* perhaps best illustrates the "backdrop" relevant to the State's cigarette tax in issue. In *Thomas*, the State attempted to tax the cattle grazing on reservation lands leased, pursuant to congressional authorization, by Indians to non-Indians. The Court found that the Indians' sovereign immunity did not operate to curtail state authority to impose this tax. The case is particularly significant because of the arguments which it expressly rejects. The tribe complained that the tax had to be invalidated because the revenues which it received as lessor would be directly reduced as a result of the state tax since lessees would be unwilling to pay the same price for tax-exempt grazing lands as for taxable grazing lands. The Court stated that it is urged that

> "the money contracted to be paid for the privilege of grazing is paid to the Indians as a tribe, and is used and expended by them for their own purposes, and that if, by reason of this taxation, the conditions existing at the time the leases were executed were changed, or could be changed by the legislature of Oklahoma at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions." *Id.*, at 273.

Thomas v. *Gay* is a part of the "backdrop" which supports Washington's power to impose the tax in issue.[8] The ap-

[8] It should be noted that the principles in *Thomas* v. *Gay* were not always those used to determine Indian immunities. A series of decisions, as noted in *McClanahan*, treated Indian immunities as derivative from the Federal Government's immunity from state taxation. During the reign of the treatment of Indian reservations as federal instrumentalities for purposes of state taxation, this Court did prohibit States from taxing the net income derived by the lessees of Indian lands. *Gillespie* v. *Oklahoma*, 257 U. S. 501 (1922). See also *Choctaw, O. & G. R. Co.* v. *Harrison*, 235 U. S. 292 (1914); *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522 (1916). While *Thomas* v. *Gay* was never explicitly overruled, these decisions were clearly inconsistent. Nevertheless, it was the line of

pellee Tribes maintain that the tax in issue is impermissible, though permissible in *Moe*, because here the Tribes are raising governmental revenues and establishing commercial enterprises. The effect of the state tax then would be to reduce the tribe's governmental revenues and force the tribe to choose between losing those revenues by forgoing its tax or subjecting reservation retailers to a competitive disadvantage compared to those retailers outside the reservation not subject to the tribal tax. These may be the facts, but they are facts which *Thomas* v. *Gay* held to be irrelevant to the recognition of a sovereign tribal immunity. In *Thomas*, the tribe's involvement was far more direct than that in issue here since it was a tribal leasing enterprise. There, the State's exercise of jurisdiction clearly required the tribe, as lessor, to forgo some portion of rent which could have been charged, and used the same as tax revenues, had the State not asserted its taxing authority. The tribe could recover the full rent (part of which may readily be considered the equivalent of a tax and another part perhaps proprietary profit) only at the risk of discouraging the economic enterprise. It is apparent therefore that the backdrop relevant to this action is one of no sovereign immunity.[9]

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analysis employed in *Gillespie* that was later overruled in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938). *Thomas* v. *Gay* stands as the traditional analysis of Indian sovereign immunity held to be relevant in *McClanahan*.

[9] This conclusion derives support from not only *Thomas* v. *Gay* but also analogous applications of sovereign tax immunities. When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other. If it were otherwise, we would not be obligated to pay federal as well as state taxes on our income or gasoline purchases. Economic burdens on the competing sovereign also do not alter the concurrent nature of the taxing authority. Decisions of this Court unequivocally recognize that a state tax comparable to that in issue, imposed on its residents' transactions in another State, or on a federal enclave, will not be barred by force of the respective immunities of that State or the Federal Government. In

Congress could of course countermand this "tradition" of no immunity. But it has not done so. Under *Mescalero*, it is dispositive of this case that no express immunity has been granted by Congress since the tradition of sovereignty counsels against the immunity. Even going beyond the *Mescalero* rule against implying an immunity from taxation, I agree with the Court that a review of the statutes does not suggest, even remotely, that Congress intended either by its laws or the policies underlying them to prevent the States from taxing these transactions.[10] In all areas of tax immunity, this Court has staunchly refused to consider the permissibility of a tax by

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Henneford v. *Silas Mason Co.*, 300 U. S. 577 (1937), this Court upheld a state tax on one of its resident's use of goods purchased in another State without regard to the fact that the other State's competitive ability to tax the same transaction was obviously reduced. The Court observed that such a tax was permissible even if no credit for the other state tax were allowed. *Id.*, at 581. See also *National Geographic Society* v. *California Board of Equalization*, 430 U. S. 551 (1977). Even the sovereign immunity of the Federal Government would not prevent the effects of a tax comparable to those in issue. In *United States* v. *County of Fresno*, 429 U. S. 452 (1977), the State sought to impose a possessory use tax on federal employees occupying federal housing located in federal enclaves within the State of California. This Court upheld the tax even though it accepted the Federal Government's argument that in order to remain competitive as an employer or landlord, it would have to reimburse the employees for the payment of the added cost. *Id.*, at 464, and n. 12. See also *United States* v. *Detroit*, 355 U. S. 466, 472 (1958); *Alabama* v. *King & Boozer*, 314 U. S. 1, 12 (1941). Thus the State, through its exercise of taxing authority, can effectively require the Federal Government to forgo revenues which would otherwise be available to it in order to remain competitive as an enterprise.

[10] The total absence of any suggestion that Congress intended to confer the immunity sought in this action should not be surprising. As this Court has found, other statutes are premised on congressional "recognition of the imperative need of a State to administer its own fiscal operations," free from federal interference. *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 73 (1976). In *Tully*, this congressional policy was not found to be diminished even though the State sought to assert its taxing authority over nonresidents.

reference to the economic burdens which it imposes if those burdens are nondiscriminatory and satisfy due process. See *United States* v. *County of Fresno*, 429 U. S. 452 (1977) (state taxation of the Federal Government); *New York* v. *United States*, 326 U. S. 572 (1946) (federal taxation of the state government); *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976) (state taxation of imports and exports). If Indians are to function as quasi co-sovereigns with the States, they like the States, must adjust to the economic realities of that status as every other sovereign competing for tax revenues, absent express intervention by Congress.[11]

B

Relying on the same pre-emption analysis, I also concur in the Court's conclusion that Indians not members of the governing tribe are not immune from taxation. *McClanahan/Mescalero* are once again dispositive. As *McClanahan* explained, the doctrine of sovereign immunity traditionally

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[11] These considerations, determinative in other areas of tax immunity law, are equally appropriate when one of the taxing jurisdictions is an Indian tribe. While Indian tribes are not States, the tribes are also not helpless hostages of the State absent judicial intervention. Two substantial sources of protection are available to them. First, the Indians could not be subjected to the burdens of discriminatory taxation, *e. g.*, a state tax on only cigarette purchases on a reservation with no corresponding off-reservation tax. The prohibition of discriminatory taxation has been recognized by this Court as a substantial safeguard against the potential for any abusive taxation since only those taxes which the general population are willing to withstand can be imposed. See *County of Fresno*, *supra*, at 463, n. 11; *Alabama* v. *King & Boozer*, *supra* (federal immunity); *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977) (state taxation of interstate commerce). Second, Indian tribes are always subject to protection by Congress. This source of protection is more than adequate to preclude any unwarranted interference with tribal self-government. Congress, and not the judiciary, is the forum charged with the responsibility of extending the necessary level of protection beyond that inherent in prohibiting nondiscriminatory taxation.

recognized by this Court derived from the sovereign relationship between a tribe and its members, and a recognition that state jurisdiction should not be asserted in a manner which "frustrates tribal self-government." 411 U. S., at 170. See *Williams* v. *Lee*, 358 U. S. 217, 219–220 (1959); *Moe*, 425 U. S., at 483. Immunities which have formed the backdrop for this Court's pre-emption analysis have been those derived from these precepts. This form of immunity, and the principles which underlie it, are simply inapplicable to the recognition of a tax immunity for an individual who resides on a reservation, but is not a member of the tribe. The holding in *Moe* that non-Indians, even those resident on a reservation, could be subject to cigarette taxes for on-reservation purchases, was a reflection of this principle. The fact that the nonmember resident happens to be an Indian by race provides no basis for distinction. The traditional immunity is not based on race, but accouterments of self-government in which a nonmember does not share.

Congress of course has gone beyond protection of merely Indian self-government, extending its regulatory authority to Indians not residing on the reservation of their own tribe, or, in fact, not residing on any reservation. See 25 U. S. C. § 13 (1970 ed.), as construed in *Morton* v. *Ruiz*, 415 U. S. 199 (1974). See also the definition of "Indian" in the Indian Reorganization Act, 25 U. S. C. § 479. Congress, however, has certainly provided no express immunity from the type of taxation in issue for Indians not members of the tribe, and under the *Mescalero* principles of construction, the backdrop of sovereignty makes it clear that it is not this Court's province to imply such an immunity. These Indians residing on the reservation are citizens of the State, just the same as their non-Indian neighbors, and I am unwilling to conclude that their Indian status entitles them to an implied immunity from taxes which their non-Indian neighbors are required to pay.

III

I cannot concur in the Court's disposition of the challenge to the state vehicle excise tax. Wash. Rev. Code, chs. 82.44 and 82.50 (1976 and Supp. 1977). The lower court did not conduct a very extensive inquiry into the mechanics or state interpretation of this excise taxing scheme, believing that the tax was clearly invalid under our prior decision in *Moe*. In *Moe*, this Court refused to uphold a State's authority to impose a property tax on motor vehicles owned by tribal members residing on the reservation. The lower court here found that *Moe* was controlling because in both cases the vehicles which the State seeks to tax are used both on and off the reservation, and the tax is assessed annually at a percentage of the market value of the vehicle. Thus the lower court, and this Court, have concluded that the only difference between the taxes is one of label, a difference insufficient to warrant a difference in outcome. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977). The Court therefore looked no further to the operation of the taxing scheme in question.

I do not find the issue clearly disposed of by *Moe* without a dispositive construction of the actual operation of this state taxing scheme. There is of course no question that this Court has discarded the controlling significance of the label a State attaches to its taxes. A tax instead must be judged by its "practical operation." *Detroit* v. *Murray Corp.*, 355 U. S. 489 (1958). But only if the practical operation of this excise taxing scheme is the same as the property taxing scheme addressed in *Moe* would the tax be invalid on the basis of that decision. In *Moe*, the tax was assessed on the basis of ownership, and, therefore, an Indian was required to pay the tax regardless of whether the vehicle was ever used off the reservation. If the state taxing scheme in question here, however, exacts a tax only in the event that the vehicle is used off the reservation, then the practical operation of

the taxes would be totally different. In *Moe,* the Indian purchaser could not avoid assessment of the tax once the vehicle was purchased. It is possible, however, that under an excise taxing scheme no tax would be assessed if the vehicle were used only on the reservation.

What is dispositive for me then is whether Washington has structured or will construe its overall tax and exemption scheme so as to avoid exaction of the tax in the event the vehicle is never used off the reservation. No decision of this Court would preclude the State from taxing Indians for the use of off-reservation highways. The lower court did not appreciate the significance of this distinction and accordingly did not focus on the manner in which the state taxing scheme would be applied to Indians limiting their vehicle use to the reservation. Judge Kilkenny, in a dissenting opinion, found the record inadequate to resolve the question of validity. I agree with Judge Kilkenny that federal courts cannot invalidate state taxes without a thorough review of state law and precedents necessary to determine whether the scheme in fact contravenes federal law. It may well be that the excise tax is applicable without exception to even those Indians using their vehicles exclusively on the reservation, but I would remand the question to the lower court to clarify that this is the controlling question so that it might examine the state taxing scheme under a corrected view of what federal law requires. Cf. *Perkins* v. *Benguet Consolidated Mining Co.,* 342 U. S. 437 (1952); *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U. S. 562, 578–579 (1977).

Assuming a construction which excludes reservation use, *arguendo,* I do not find it significant that Washington has not tailored this tax to the "amount of actual off-reservation use," in which case the Court suggests this tax might be permissible. A non-Indian resident of the State of Washington pays the same tax on his use of the public highways whether he drives his car once a year or every day. We have certainly never held that a State is under an obligation to apportion

its use taxes in such a way that reflects actual use. I am aware of no principle for making a different rule to cover the case of Indians using the public highways. If they choose to avoid the use tax, they need only limit their driving to reservation boundaries. But once they venture onto highways off the reservation, nothing in the United States Constitution, or in the federal statutes, prevents them from being subject to use taxes in common with other state residents.

I would therefore reverse the judgment of the District Court on the issue of the permissibility of the State's assessment of its cigarette tax on purchases made by non-Indians, and by Indians not members of the governing tribe. I would remand the case to that court for a determination of the construction and effect of the state excise tax.

COFFY v. REPUBLIC STEEL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79-81. Argued February 27, 1980—Decided June 10, 1980

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (Act) provides that any person who leaves a permanent job to enter the military, satisfactorily completes military service, and applies for re-employment within 90 days of being discharged from the military must be reinstated to the former job "without loss of seniority," 38 U. S. C. § 2021 (b)(1). Upon being honorably discharged from military service, petitioner made timely application for reinstatement with respondent, his former employer. Because respondent was then in the process of laying off employees, petitioner was reinstated in layoff status. While laid off, he received weekly payments under the supplemental unemployment benefits (SUB) plan created by the applicable steel industry collective-bargaining agreement. Under the plan, an employee is entitled to receive SUB payments only if he has completed two years of continuous service prior to being laid off, and the amount of the weekly benefit is determined by his hourly wage rate, the number of his dependents, the amount of state unemployment compensation he is receiving, and the level of funding remaining in the plan. The length of time during which an employee receives SUB payments is determined by the number of credit units he has accumulated before being laid off, with one-half credit being accrued for each week in which he worked "any" hours, or was paid for "any" hours not worked (such as for vacation or jury duty), or lost "any" hours because he was performing certain union duties or was on disability leave. The plan also provides that if an employee enters the Armed Services, only the credit units credited to him at the time of his entry into the service shall be credited to him upon reinstatement as an employee with unbroken continuous service, except as may otherwise be required by law. Petitioner received SUB payments for only 25 weeks, whereas if he had been employed by respondent during his period of military service, he would have been entitled to 52 weeks of payments. Alleging that respondent violated his statutory re-employment rights by refusing to consider his military service time in computing the amount of SUB payments to which he was entitled, petitioner, represented by the Department of Justice pursuant to the Act, filed an action

in Federal District Court, which ultimately held that SUB payments were not a perquisite of seniority entitled to statutory protection. The Court of Appeals affirmed.

Held: SUB payments provided pursuant to the steel industry collective-bargaining agreement are perquisites of seniority to which a returning veteran is entitled under the Act. Pp. 195–206.

(a) Under the Act, which is to be liberally construed for the returning veteran's benefit, the veteran steps back on the seniority escalator at the precise point he would have occupied had he kept his position with his employer continuously during the period of military service. Cf. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275. In determining whether a particular benefit qualifies as a perquisite of seniority under the Act, first, there must be a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service, and, second, the "real nature" of the benefit must be "a reward for length of service," rather than "a form of short-term compensation for services rendered." *Alabama Power Co.* v. *Davis*, 431 U. S. 581, 589. Pp. 195–198.

(b) The SUB plan satisfies the reasonable-certainty prong of the *Alabama Power* test, since if petitioner had remained continuously employed by respondent instead of entering the military, he would have accumulated credits from the date he was hired until the date he was laid off. The plan also satisfies the second prong of the test, because supplemental unemployment benefits are not a form of deferred short-term compensation, but are a reward for length of service closely analogous to traditional forms of seniority. The purpose and function of SUB plans is to provide economic security during periods of layoff to employees who have been in the service of the employer for a significant period, and the specific provisions of the steel industry SUB plan support this general purpose of SUB programs. Pp. 199–206.

590 F. 2d 334, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Alan I. Horowitz argued the cause *pro hac vice* for petitioner. With him on the brief were *Solicitor General McCree*, *Beate Bloch*, and *William H. Berger*.

Michael A. Nims argued the cause for respondent. With him on the brief was *Victor E. DeMarco*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U. S. C. § 2021 *et seq.*, provides that any person who leaves a permanent job to enter the military, satisfactorily completes military service, and applies for re-employment within 90 days of being discharged from the military must be reinstated to the former job without loss of seniority. This case presents the question whether supplemental unemployment benefits provided pursuant to the steel industry collective-bargaining agreement are perquisites of seniority to which a returning veteran is entitled under the statute.

I

Petitioner Thomas Coffy was employed by respondent Republic Steel Corp. (Republic) from April 30, 1968, until September 17, 1968, and again from January 24, 1969, until September 9, 1969, when he entered military service. He served in the military until he was honorably discharged on August 16, 1971. He made timely application for reinstatement on September 14, 1971. Because Republic was then in the process of laying off employees and Coffy would already have been laid off if he had remained continuously employed during his period of military service, he was reinstated in layoff status. Coffy was recalled to work on July 1, 1972.

While Coffy was laid off, he received weekly payments under the supplemental unemployment benefits (SUB) plan created by the collective-bargaining agreement between the major steel companies, including Republic, and the United Steelworkers of America (Steelworkers). Coffy received SUB payments for 25 weeks.[1] If he had been employed by Republic during his period of military service, he would have been

[1] Republic erroneously credited Coffy with approximately nine SUB credits for his 1968 employment. The plan provides that accumulated SUB credits are canceled if an employee quits work voluntarily, as petitioner did after his layoff in 1968. The overpayment was recovered through deductions from petitioner's paycheck after he returned to work.

entitled to 52 weeks of SUB payments. Coffy, represented by the Department of Justice pursuant to 38 U. S. C. § 2022, filed this action in the United States District Court for the Northern District of Ohio, alleging that Republic violated his statutory re-employment rights by refusing to consider his military service time in computing the amount of SUB payments to which he was entitled.[2]

The District Court, relying on *Foster* v. *Dravo Corp.*, 420 U. S. 92 (1975), entered judgment for respondent. The court held that the plan was "a bona fide effort to relate qualification for weekly benefits . . . to work actually performed," App. to Pet. for Cert. 24a, and therefore the benefits were not a perquisite of seniority. While the case was pending on petitioner's appeal to the United States Court of Appeals for the Sixth Circuit, we held in *Alabama Power Co.* v. *Davis*, 431 U. S. 581 (1977), that pension benefits are perquisites of seniority protected under the statute. The Court of Appeals *sua sponte* vacated the District Court's judgment and remanded for reconsideration in light of *Alabama Power*.

On remand, the District Court adhered to its decision that SUB credits are not seniority rights entitled to statutory protection. 461 F. Supp. 344 (1978). The Court of Appeals affirmed on the opinion of the District Court. 590 F. 2d 334 (1978). We granted certiorari, 444 U. S. 924 (1979), to resolve a conflict among the Circuits concerning this important question in the interpretation of the statute.[3] We now reverse.

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[2] The complaint alleged a violation of § 9 of the Military Selective Service Act of 1967, 50 U. S. C. App. § 459 (1970 ed.). The provisions of that statute relating to veterans' re-employment rights were re-enacted without substantive change in Title IV of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U. S. C. § 2021 *et seq.*

[3] The Third and Seventh Circuits have held that SUB payments are perquisites of seniority to which a returning veteran is entitled under the Act. *Hoffman* v. *Bethlehem Steel Corp.*, 477 F. 2d 860 (CA3 1973); *Akers* v. *General Motors Corp.*, 501 F. 2d 1042 (CA7 1974). Approximately

II

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (Act), 38 U. S. C. § 2021 *et seq.*, requires that returning veterans be reinstated to the jobs they left for military service "or to a position of like seniority, status, and pay." § 2021 (a)(B)(i).[4] The Act further provides that the veteran

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1,947,400 workers are covered by collective-bargaining agreements that provide supplemental unemployment benefits. See U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 2065, Characteristics of Major Collective Bargaining Agreements 101 (1980).

[4] Title 38 U. S. C. § 2021 provides in relevant part:

"(a) In the case of any person who is inducted into the Armed Forces of the United States . . . and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9 (a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service . . . —

. . . . . .

"(B) if such position was in the employ of a . . . private employer, such person shall—

"(i) if still qualified to perform the duties of such position, be restored by such employer . . . to such position or to a position of like seniority, status, and pay[,]

. . . . . .

"unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. . . .

"(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of . . . this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

"(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with . . .

be reinstated "without loss of seniority." § 2021 (b)(1). We interpreted the predecessor of § 2021 [5] to mean that the returning veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284–285 (1946). Congress incorporated this principle into the present statute by providing that any person reinstated under the Act should be given "such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously" during the period of military service. § 2021 (b)(2). The statute is to be liberally construed for the benefit of the returning veteran. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, at 285.

We have several times had occasion to consider whether a particular type of benefit is a perquisite of seniority. *Accardi* v. *Pennsylvania R. Co.*, 383 U. S. 225 (1966), involved a claim for severance pay. The amount of the payment depended on the employee's length of "compensated service." *Id.*, at 228. We rejected the employer's argument that the payment was not based on seniority, but on total service to the company. Rather, we held, the "real nature" of the payments was compensation for the loss of the job. *Id.*, at 230. Because "the cost to an employee of losing his job is not measured by how much work he did in the past . . . but by the rights and benefits he forfeits by giving up his job"—rights and benefits that

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this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment."

[5] The Selective Training and Service Act of 1940, ch. 720, § 8 (b), 54 Stat. 890, later re-enacted as the Military Selective Service Act of 1967, 50 U. S. C. App. § 459 (1970 ed.), and subsequently re-enacted as 38 U. S. C. § 2021 *et seq.* See n. 2, *supra*.

are largely determined by seniority—the severance payment was "just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall." *Ibid.*

We reached a different result in evaluating a claim for vacation benefits in *Foster* v. *Dravo Corp.*, 420 U. S. 92 (1975). The real nature of that benefit, we observed, was reflected in "the common conception of a vacation as a reward for and respite from a lengthy period of labor," *id.*, at 101. The contractual provisions for additional vacation credits and higher benefits for overtime work and for pro rata vacations for employees laid off before achieving the necessary number of weeks worked supported that conception. Accordingly, we held that vacation pay was intended as a form of deferred short-term compensation for work actually performed and was not, therefore, a seniority right protected by the statute.

Most recently, in *Alabama Power Co.* v. *Davis*, 431 U. S. 581 (1977), we held that pension benefits were perquisites of seniority for purposes of the Act. Although the amount of the payment was directly dependent on the years of accredited service, the true nature of the benefits was "a reward for length of service," *id.*, at 593. The lengthy period required for vesting, the use of payment formulas based on earnings at the time of retirement, and "the function of pension plans in the employment system"—namely, to provide financial security to employees, assure a stable work force, and increase efficiency—all led to the conclusion that pension payments "are predominantly rewards for continuous employment with the same employer." *Id.*, at 594. In *Alabama Power*, we summarized the principles that have emerged from the cases and concluded that they establish a two-pronged test for determining whether a benefit is a perquisite of seniority under the Act. First, there must be a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service. *Id.*, at 589. Second, the nature of the benefit must be "a reward for length of service," rather

than a form of "short-term compensation for services rendered." *Ibid.*

Our task, then, is to evaluate the SUB plan at issue in this case in light of these principles.

III

A

The first SUB plan for the steel industry was established through collective bargaining in 1956. The revised plan which is the subject of this action became effective January 1, 1969. The plan provides three types of benefits: a "weekly benefit," a "short week benefit," [6] and a relocation allowance. Petitioner's claim involves weekly benefits, which are provided to employees laid off from work as a supplement to unemployment compensation benefits provided under state law. The amount of an employee's weekly SUB payment is determined by his hourly wage rate, the number of his dependents, the amount of state unemployment compensation he is receiving, and the level of funding remaining in the plan. The length of time during which the employee receives SUB payments is determined by the number of credit units he has accumulated before being laid off.

Section 2.0 of the plan provides that an employee accrues one-half credit for each week in which he worked any hours, or was paid for any hours not worked (such as for vacation or jury duty), or lost any hours because he was performing certain union duties or was on disability leave.[7] A maximum of 52 credit units may be accrued by an employee at any one time. An employee is entitled to receive SUB payments only if he has completed two years of continuous service prior to

[6] An employee having two years of continuous service is eligible for a "short week benefit" for any week in which some, but fewer than 32, hours are worked.

[7] Certain categories of employees accrue and exhaust credits at a slightly different rate, see §§ 2.1 and 4.10 of the plan, App. 20, 27, but that distinction is not significant for purposes of this analysis.

being laid off. An employee who meets this threshold requirement may receive one week of supplemental unemployment benefits for each credit unit he has accumulated.

The plan also provides, in § 7.2:

> "If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purposes of the Plan to be on leave of absence and shall not be entitled to any Benefit. Only the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may otherwise be required by law."

Under this provision Republic declined to credit petitioner for his military service time in calculating the number of SUB payments to which he was entitled.[8] We must determine whether the provision is in conflict with the Act.

B

The SUB plan satisfies the reasonable-certainty prong of the *Alabama Power* test, since if Coffy had remained continuously employed by Republic instead of entering the military, he would have accumulated credits from the date he was hired until the date he was laid off. We conclude that the plan also satisfies the second prong of the test, because supplemental unemployment benefits are not a form of deferred short-term compensation, but are a reward for length of service closely analogous to traditional forms of seniority.

[8] Coffy received credit for his time in the military in computing his period of continuous service to determine his eligibility to receive benefits. We find no inconsistency in the company's action in counting his military service time toward eligibility to receive benefits, but not toward the number of credits he had accumulated. The plain intent of § 7.2 is that during their period of military service, employees shall neither receive benefits nor accrue credits, but that military service shall not be considered a break in continuous service.

The concept of supplemental unemployment benefits evolved from the demand by organized labor for a guaranteed annual wage. When it became evident that a guaranteed annual wage was impractical in their industries, unions such as the Steelworkers and the United Auto Workers transformed their guaranteed annual wage demands into proposals to supplement existing unemployment compensation programs. These proposals ultimately were adopted in several industries in the form of SUB plans. See J. Becker, Guaranteed Income for the Unemployed: The Story of SUB 9–20 (1968); A. Freedman, Security Bargains Reconsidered: SUB, Severance Pay, Guaranteed Work 4–5 (The Conference Board 1978). From the beginning, then, the purpose of SUB plans was to provide employment security regardless of the hours worked rather than to afford additional compensation for work actually performed. From the employer's standpoint SUB's, like pension benefits, help to assure a stable work force through periods of short-term layoffs and, like severance payments, may increase management flexibility in implementing technological advances. See Becker, *supra*, at 55–57, 248.

The essential function of SUB plans is to provide economic security for regular employees in the event they are laid off. Protection against layoff is, of course, one of the traditional attributes of seniority. SUB payments provide a second-level protection against layoff. If an employee does not have sufficient seniority to avoid being laid off, he may still have achieved the minimum level of seniority necessary to receive SUB payments during his layoff. Unlike vacations, SUB's cannot be compensation for work performed, a "reward for and respite from a lengthy period of labor," *Foster* v. *Dravo Corp.*, 420 U. S., at 101, for they are contingent on the employee's being thrown out of work; unless the employee is laid off he will never receive SUB payments. In this sense, SUB's are analogous to severance payments: they are "compensation for loss of jobs." *Accardi*, 383 U. S., at 230. See Freedman, *supra*, at 2.

We turn now to the specific provisions of the steel industry SUB plan to determine whether they support or contradict our understanding of the general purpose of SUB programs. The District Court held that the availability of SUB payments was so closely related to hours actually worked as to demonstrate that the plan was a " 'bona fide effort to compensate for work actually performed.' " 461 F. Supp., at 346. That conclusion is at odds with the literal terms of the plan, which provide that SUB credits are earned for all weeks in which an employee has *any* hours in one of the three categories specified in § 2.0. This provision was the result of a 1962 modification of the original 1956 plan, which had directly correlated hours worked with credits earned by providing that $\frac{1}{10}$ credit would be earned for every eight hours worked, up to a maximum of $\frac{1}{2}$ unit per week. The District Court recognized that the present plan did not expressly relate entitlement to benefits to hours worked, but found this fact to be of no significance because " '[c]ircumstances existing in the steel industry, as revealed by the uncontradicted evidence in this case, demonstrate that, in practice, the minimum workweek is 32 hours. . . . The plan must be construed in light of actual conditions in the steel industry. The possibility of an employee working only one hour during any week does not exist.' " *Id.*, at 347.[9]

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[9] The District Court's view that the benefits were intended to be correlated to work actually performed is supported by the testimony of James Carney, an attorney for United States Steel Corp. He stated that the reason for the 1962 change was that there was no need to keep track of the actual hours worked since it was rare for anyone to work fewer than 32 hours a week. This testimony was contradicted, to some extent, by that of Joseph Senturia, a consultant to the Steelworkers. He testified that the change was adopted to liberalize the accrual of credit units and as part of a general simplification of SUB plans in use in the steel industry. In fact, by 1962 SUB plans in all industries provided for accumulation of credit in any week in which any work was performed or any pay received. See J. Becker, Guaranteed Income for the Unemployed: The Story of SUB 125 (1968).

We of course accept the District Court's factual findings concerning the practice in the industry. We do not agree, however, that a *de facto* 32-hour minimum workweek means that SUB's are intended as deferred compensation for work performed. Credits are also earned for weeks in which the employee is paid for any hours not worked, as for jury duty, or in which any hours are lost because the employee is disabled or performing certain union duties. These hours, even if considered similar to hours worked because the employee receives "wage substitutes" for them, are not subject to the 32-hour industry custom.

We observe also that the normal workweek in the industry, as provided by Art. 6, § 1, of the collective-bargaining agreement, is 40 hours, not 32. The SUB plan makes no provision for accrual of additional credits for hours worked over 32 per week, or for overtime work. This omission is not suggestive of a desire to compensate work actually performed.

Further, a major reason that it is rare for an employee who works at all to work fewer than 32 hours in a week is the "short week benefit" provided under the SUB plan.[10] Quali-

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[10] Employees having two years of continuous service are eligible for a "short week benefit" for any week in which they work some, but fewer than 32, hours. Roughly speaking, the employee is paid at his regular hourly rate for the difference between 32 hours and the number of hours worked. The amount of the benefit is computed by taking the amount by which 32 hours exceeds the sum of the hours worked, paid, not worked for reasons other than lack of work, lost because of labor problems involving the company or transportation or utility companies, or not worked because the employee quit or was suspended or discharged, and multiplying that number by the employee's regular hourly wage rate. One-half credit unit is canceled for every week in which the employee receives short-week benefits. Since the employee also receives one-half credit because he worked some hours in the week, the net effect is that his accumulated credits remain the same.

The other reasons for the 32-hour custom which were cited in the testimony included the nature of steel manufacturing operations, which must

fied employees who work some hours, but fewer than 32, receive benefits under the short-week provisions of the plan; those who do not work at all receive weekly benefits. The union's success in effectively achieving a guaranteed 32-hour week through the mechanism of the short-week benefit does not logically alter the nature of the weekly benefit negotiated as part of the same plan.

Even if eligibility for SUB payments were closely related to hours worked, that fact would not, by itself, render them compensation rather than seniority rights. We emphasized in *Alabama Power* that it is the nature of the benefit, not the formula by which it is calculated, that is the crucial factor, for "[e]ven the most traditional kinds of seniority privileges could be as easily tied to a work requirement as to the more usual criterion of time as an employee." 431 U. S., at 592. As we have explained, the specific provisions of the steel industry plan support, rather than contradict, our conclusion that SUB payments are in the nature of a reward for length of service.

The District Court concluded that SUB payments could not be perquisites of seniority for the further reason that the benefits are not proportionate to the length of service. Under the plan, an employee must have a minimum of two years' seniority to be eligible for SUB payments, no employee may accumulate more than 52 units of SUB credits, and the amount of the benefit does not increase with the length of service as would a pension benefit. Thus an employee who has worked continuously for two years will have met the threshold requirement and will also have accumulated 52 units

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be conducted on a 24-hour basis; Art. 6, § 6, of the collective-bargaining agreement, which provides that any employee who reports for work must be given at least 4 hours' work; and Art. 10, § 7, of the agreement, which requires management to consult with the union on the distribution of work if a decrease in the amount of work available results in an average workweek of 32 hours or fewer.

of credit; [11] he is eligible for benefits for the same length of time, and computed according to the same formula, as an employee with 20 years' seniority.[12] According to the District Court, the facts that no benefits are available to employees whose seniority is less than two years and that after 52 credits have been accumulated additional seniority does not lead to increased benefits were evidence that the benefit is not a reward for longevity of service.[13]

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[11] The 2-year continuous service requirement and the 52-credit maximum accumulation are not coextensive. For example, an employee who is laid off before he has been with the company for two years continues to compute his period of continuous service from his original hire date, but does not accumulate credit units during the time he is laid off. Similarly, § 2.4 of the plan permits the employer to cancel the credit units of an employee who willfully falsifies or withholds information on which his weekly benefit is based; such cancellation would not affect the length of the employee's continuous service.

[12] Of course, since a more senior employee's wage rate is likely to reflect his longer service with the company, a senior employee often will receive a higher SUB payment than will a junior employee.

Modifications to the steel industry SUB program adopted in 1977 have increased the differentiation between less senior employees and those with greater seniority. Benefit payments for employees with 20 or more years of service will no longer be reduced because of the financial position of the fund, and the maximum number of credits that may be accumulated has been doubled, to 104. See A. Freedman, Security Bargains Reconsidered: SUB, Severance Pay, Guaranteed Work 22 (The Conference Board 1978).

[13] Respondent argues that in fact the SUB plan provides benefits in an inverse relationship to seniority. Respondent observes that, because seniority protects against layoff, the most senior employees are the least likely to receive SUB's, and by the time very senior employees are laid off their benefit payments may be reduced in amount pursuant to § 1.5 of the plan because the fund has been depleted by prior payments to less senior employees. This argument ignores that particular components of a seniority program need not invariably provide greater benefits to more senior workers. "Bumping" provisions, for example, may seldom be used by very senior employees, and yet they are unquestionably rights of seniority. In any event, the record contains no evidence of the funding history of the steel industry SUB program that would permit us to draw any conclusion as to the probability of benefit payments being reduced pursuant to § 1.5.

A benefit need not be meticulously proportioned to longevity of service to constitute a perquisite of seniority, however, as long as it performs a function akin to traditional forms of seniority. In fact, the very factors the District Court cited to show that SUB's are not forms of seniority benefits are equally relevant to demonstrate that they are not compensation for services rendered. An employee receives no benefits if he has worked for fewer than two years when he is laid off or if he voluntarily terminates his employment. Such a threshold requirement is more characteristic of seniority provisions than of compensation; in fact, other seniority benefits of the collective-bargaining agreement between Republic and the Steelworkers are also available only to employees with two years' seniority.[14] Similarly, an employee cannot accumulate more than 52 credits at a time; any work performed after that ceiling is reached goes "uncompensated." Moreover, the amount of the benefit payment is determined by four factors, none of which appears designed to compensate for hours actually worked: the wage rate at the time of layoff (not at the time the credits were earned); the number of dependents of the employee; the amount of state unemployment compensation received; and the financial position of the benefit fund.

IV

We conclude that the purpose and function of the steel industry SUB plan is to provide economic security during periods of layoff to employees who have been in the service of the employer for a significant period. Thus the benefits are in the nature of a reward for length of service, and do not represent deferred short-term compensation for services actually rendered. Accordingly, SUB payments are perquisites

[14] For example, an employee with two years' seniority who is laid off may exercise "bumping" rights over less senior employees in the seniority pool, or may transfer to another plant with priority over other applicants, including recently hired employees of the other plant.

of seniority to which returning veterans are entitled under the Act. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

EXXON CORP. *v.* DEPARTMENT OF REVENUE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 79–509. Argued March 18, 1980—Decided June 10, 1980

Appellant, a vertically integrated petroleum company doing business in several States, was organized, during the years in question in this case, into three levels of management, one of which was responsible for directing the operating activities of the company's functional departments. Transfers of products and supplies among the three major functional departments—Exploration and Production, Refining, and Marketing—were theoretically based on competitive wholesale prices. Appellant had no exploration and production or refining operations in Wisconsin and carried out only marketing in that State. During the years in question, appellant filed income tax returns in Wisconsin using a separate geographical system of accounting which reflected only the Wisconsin marketing operations and showed a loss for each year, thus resulting in no taxes being due, but appellee Wisconsin Department of Revenue, upon auditing the returns, assessed taxes, based on appellant's total income, pursuant to Wisconsin's tax apportionment statute. Ultimately, after appellant's application for abatement had proceeded through administrative and judicial review, the Wisconsin Supreme Court held that appellant's Wisconsin marketing operations were an integral part of one unitary business and that therefore its total corporate income was subject to the statutory apportionment formula. The court further held that situs income derived from crude oil produced by appellant outside Wisconsin and transferred to its own refineries and thus part of the unitary stream of income was apportionable under the Wisconsin statute despite appellant's separate functional accounting system, and that taxation of such situs income did not impermissibly burden interstate commerce.

Held:

1. The Due Process Clause of the Fourteenth Amendment did not prevent Wisconsin from applying its statutory apportionment formula to appellant's total income. Pp. 219–225.

(a) The Due Process Clause imposes two requirements for state taxation of the income of a corporation operating in interstate commerce: a "minimal connection" or "nexus" between the corporation's interstate activities and the taxing State, and "a rational relationship between the

income attributed to the State and the intrastate values of the enterprise." *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 436–437. Such a nexus is established if the corporation "avails itself of the 'substantial privilege of carrying on business' within the State." *Id.*, at 437. Here, appellant concededly avails itself of that privilege through its marketing operations within Wisconsin. Pp. 219–220.

(b) Appellant's use of separate functional accounting by which it shows what portion of its income is derived from exploration and production and from refining—functions occurring outside Wisconsin—does not demonstrate that application of the Wisconsin apportionment statute violated the Due Process Clause. A company's internal accounting techniques are not binding on a State for tax purposes and are not required to be accepted as a matter of constitutional law for such purposes. Pp. 220–223.

(c) The "linchpin of apportionability" for state income taxation of an interstate enterprise is the "unitary-business principle." *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, at 439. If a company is a unitary business, then a State may apply an apportionment formula to the taxpayer's total income in order to obtain a "rough approximation" of the corporate income that is "reasonably related to the activities conducted within the taxing State." *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 273. Here, the evidence fully supports the conclusion that appellant's marketing operations in Wisconsin were an integral part of such a unitary business. And appellant's use of separate functional accounting, and its decision for purposes of corporate accountability to assign wholesale market values to interdepartmental transfers of products and supplies, do not defeat the clear and sufficient nexus between appellant's interstate activities and the taxing State. Pp. 223–225.

2. Similarly, the Due Process Clause did not preclude Wisconsin from subjecting to taxation under its statutory apportionment formula appellant's income derived from extraction of oil and gas located outside the State which was used by the Refining Department, and the State was not required to allocate such income to the situs State. There was a unitary stream of income, of which the income derived from internal transfers of raw materials from exploration and production to refining was a part. This was a sufficient nexus to satisfy the Due Process Clause, and there was also the necessary "rational relationship" between the income attributed to the State by the apportionment formula and the intrastate value of the business. Pp. 225–227.

3. The Commerce Clause did not require Wisconsin to allocate all income derived from appellant's exploration and production function to the situs State rather than include such income in the apportionment

formula. The Wisconsin taxing statute, as applied, did not subject interstate business to an unfair burden of multiple taxation. *Mobil Oil Corp.* v. *Commissioner of Taxes, supra.* The State sought to tax income, not property ownership, and it was the *risk* of multiple taxation that was being asserted, actual multiple taxation not having been shown. The Commerce Clause did not require that any income which appellant was able to separate through accounting methods and attribute to exploration and production of crude oil and gas be allocated to the States in which those production centers were located. The geographic location of such raw materials did not alter the fact that such income was part of the unitary business of appellant's interstate enterprise and was subject to fair apportionment among all States to which there was a sufficient nexus with the interstate activities. Pp. 227–230.

90 Wis. 2d 700, 281 N. W. 2d 94, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined except STEWART, J., who took no part in the consideration or decision of the case.

Thomas G. Ragatz argued the cause for appellant. With him on the briefs were *Leonard S. Sosnowski, Lloyd M. McBride,* and *Paul D. Frenz.*

Gerald S. Wilcox, Assistant Attorney General of Wisconsin, argued the cause for appellee. With him on the brief was *Bronson C. La Follette,* Attorney General.*

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*Briefs of *amici curiae* urging affirmance were filed by *William D. Dexter, Charles A. Groddick,* Attorney General of Alabama, *George Deukmejian,* Attorney General of California, *J. D. MacFarlane,* Attorney General of Colorado, *Richard Gebelein,* Attorney General of Delaware, *David H. Leroy,* Attorney General of Idaho, *Theodore L. Sendak,* Attorney General of Indiana, *Steven Sachs,* Attorney General of Maryland, *Frank J. Kelly,* Attorney General of Michigan, *Warren R. Spannaus,* Attorney General of Minnesota, *Mike Greely,* Attorney General of Montana, *Paul L. Douglas,* Attorney General of Nebraska, *Thomas D. Roth,* Attorney General of New Hampshire, *Jeff Bingaman,* Attorney General of New Mexico, *Rufus L. Edmisten,* Attorney General of North Carolina, *Albert R. Hausauer,* Special Assistant Attorney General of North Dakota, *James Redden,* Attorney General of Oregon, *Robert B. Hanen,* Attorney General of Utah, and *James R. Eads* for the Multistate Tax Commission et al.; and by *William J. Scott,* Attorney General of Illinois, and *Fred H. Montgomery* and *John*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case raises three important questions regarding state taxation of the income of a vertically integrated corporation doing business in several States. The first issue is whether the Due Process Clause of the Fourteenth Amendment prevents a State from applying its statutory apportionment formula to the total corporate income of the taxpayer when the taxpayer's functional accounting separates its income into the three distinct categories of marketing, exploration and production, and refining, and when the taxpayer performs only marketing operations within the State. The second issue is whether the Due Process Clause permits a State to subject to taxation under its statutory apportionment formula income derived from the extraction of oil and gas located outside the State which is used by the refining department of the taxpayer, or whether the State is required to allocate such income to the situs State. The third issue is whether the Commerce Clause requires such an allocation to the situs State.

I

A

Appellant Exxon Corp.,[1] a vertically integrated petroleum company, is organized under the laws of Delaware with its

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D. WhiteNack, Special Assistant Attorneys General, *Carl R. Ajello*, Attorney General of Connecticut, *Francis X. Bellotti*, Attorney General of Massachusetts, and *Warren R. Spannaus*, Attorney General of Minnesota, for the State of Illinois et al.

Briefs of *amici curiae* were filed by *Theodore J. Carlson, Davison W. Grant, Joseph J. Schumm, Jr.*, and *Thomas C. Hutton* for Associated Dry Goods Corp.; and by *Frank M. Keesling, pro se.*

[1] The original taxpayer during the years in question was Humble Oil and Refining Co., a wholly owned subsidiary of Standard Oil Co. of New Jersey. In 1956, Standard Oil Co. of New Jersey organized as a wholly owned subsidiary Pate Oil Co., a Delaware corporation. Pate acquired all of the assets and liabilities of Saxon Corp., a Wisconsin company which marketed petroleum products and accessory products in that State. Pate

general offices located in Houston, Tex. During the years in question here, 1965 through 1968, appellant's corporate organization structure consisted of three parts: Corporate Management, Coordination and Services Management, and Operations Management.

Corporate Management, which was the highest order of management for the entire corporation, consisted of the board of directors, the executive committee, the chairman of the board (who was also the chief executive officer), the president, and various directors-in-charge who were members of the board of directors. Coordination and Services Management was composed of corporate staff departments which provided specialized corporate services. These services included long-range planning for the company, maximization of overall company operations, development of financial policy and procedures, financing of corporate activities, maintenance of the accounting system, legal advice, public relations, labor relations, purchase and sale of raw crude oil and raw materials, and coordination between the refining and other operating functions "so as to obtain an optimum short range operating program." App. 189; *id.*, at 187–192.[2]

The third level of management within the corporation was

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continued those marketing operations. In 1960, Pate was merged into Humble Oil and Refining Co., and the Wisconsin marketing operations were continued by that company under the brand name "Enco." In early 1973, Humble was merged into Standard Oil Co. of New Jersey, and the corporate name was changed to Exxon Corp. Exxon is the legal successor to Humble Oil and Refining Co. The taxpayer will be referred to throughout this opinion by its present name, Exxon.

[2] The corporate staff departments which were part of Coordination and Services Management, and which were not considered profit centers for accounting purposes by appellant, included: Corporate Planning Department, Secretary's Department, Supply Department, Treasury Department, Comptroller's Department, Tax Department, Law Department, Public Relations Department, Government Relations Department, Employee Relations Department, General Services Department, Medical Department, and Aviation Department. App. 189–192.

Operations Management, which was responsible for directing the operating activities of the functional departments of the company. These functional departments were Exploration and Production, Refining, Marketing, Marine, Coal and Shale Oil, Minerals, and Land Management. Each functional department was organized as a separate unit operating independently of the other operating segments, and each department had its own separate management responsible for the proper conduct of the operation. These departments were treated as separate investment centers by the company, and a profit was determined for each functional department.

At all relevant times each operating department was independently responsible for its performance. This arrangement permitted centralized management to evaluate each operation separately. Each department was therefore required to compete with the other departments for available investment funds, and with other members of the industry performing the same function for the company's raw materials and refined products. There was no requirement that appellant's crude oil go to its own refineries or that the refined products sold through marketing be produced from appellant's crude oil.

Transfers of products and raw materials among the three major functional departments—Exploration and Production, Refining, and Marketing—were theoretically based on competitive wholesale market prices. For purposes of separate functional accounting, transfers of crude oil from Exploration and Production to Refining were treated as sales at posted industry prices; transfers of products from Refining to Marketing were also based on wholesale market prices. If no readily available wholesale market value existed for a product, then representatives of the two departments involved would negotiate as to the appropriate internal transfer value.

Appellant had no exploration and production operations or refining operations in Wisconsin; the only activity carried out

in that State was marketing. The Wisconsin marketing district reported administratively to the central region office in Chicago, which in turn was responsible to the Marketing Department headquarters in Houston. App. 217. The motor oils, greases, and other packaged materials sold by appellant in Wisconsin during this period were manufactured outside the State and then shipped into that State from central warehouse facilities in Chicago. Tires, batteries, and accessories were centrally purchased through the Houston office and then shipped into Wisconsin for resale. The gasoline sold in Wisconsin was not produced by Exxon but rather was obtained from Pure Oil Co. in Illinois under an exchange agreement, permitting Exxon to reduce the cost of transporting the gasoline from its source to the retail outlets. This exchange agreement was negotiated by the Supply and Refining Departments. Additives were put into the Pure Oil gasoline in order to make the final product conform to uniform Exxon standards.

Exxon used a nationwide uniform credit card system, which was administered out of the national headquarters in Houston. Uniform packaging and brand names were used, and the overall plan for distribution of products was developed in Houston. Promotional display equipment was designed by the engineering staff at the marketing headquarters.

B

Because appellant marketed its products in Wisconsin during the calendar years 1965 through 1968, it was required to file corporate income and franchise tax returns in that State for those years. Exxon prepared the returns based on separate state accounting methods, reflecting only the Wisconsin marketing operation. The returns showed losses in the amounts of $821,320 for 1965, $1,159,830 for 1966, $1,026,224 for 1967, and $919,575 for 1968. Accordingly, no tax was shown as being due for any of those years.

Appellee Wisconsin Department of Revenue audited Exxon for the years in question, and on June 25, 1971, the Department sent the taxpayer a notice of assessment of additional income and franchise tax. The Department concluded that pursuant to Wis. Stat. § 71.07 (2) (1967) [3] the Wisconsin marketing operation was "an integral part of a unitary business," and therefore Exxon's taxable income in Wisconsin must be determined by application of the State's apportionment formula to the taxpayer's total income. The Department's calculation revealed an additional taxable income of $4,532,155 for the period 1965 through 1968. Additional

[3] Wisconsin Stat. § 71.07 (2) (1967) during this period provided in relevant part:

"Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state. The amount of such income attributable to Wisconsin may be determined by an allocation and separate accounting thereof, when the business of such person within the state is not an integral part of a unitary business, provided, however, that the department of taxation may permit an allocation and separate accounting in any case in which it is satisfied that the use of such method will properly reflect the income taxable by this state. In all cases in which allocation and separate accounting is not permissible, the determination shall be made in the following manner: There shall first be deducted from the total net income of the taxpayer such part thereof (less related expenses, if any) as follows the situs of the property. . . . The remaining net income shall be apportioned to Wisconsin on the basis of the ratio obtained by taking the arithmetical average of the following 3 ratios:

"(a) The ratio of the tangible property, real, personal and mixed, owned and used by the taxpayer in Wisconsin in connection with his trade or business during the income year to the total of such property of the taxpayer owned and used by him in connection with his trade or business everywhere. . . .

"(b) . . . the ratio of the total cost of manufacturing, collecting, assembling or processing within this state to the total cost of manufacturing, or assembling or processing everywhere. . . .

"(c) . . . the ratio of the total sales made through or by offices, agencies or branches located in Wisconsin during the income year to the total net sales made everywhere during said income year."

taxes in the amount of $316,470.85 were assessed against appellant.[4]

Exxon filed an application for abatement in July 1971, which the Department denied on November 30, 1971. Appellant then filed a petition for review with the Wisconsin Tax Appeals Commission. The Commission agreed with the Department that Exxon's separate geographical accounting did not accurately reflect its Wisconsin income for tax purposes. CCH Wis. Tax Rep. ¶ 201–223, p. 10,410 (1976). However, the Commission concluded that appellant's three main functional operating departments—Exploration and Production, Refining, and Marketing—were separate unitary businesses. *Id.*, at 10,409. According to the Commission, Exxon's marketing operation in Wisconsin was an integral part of its overall marketing function, but was not an integral part of its exploration and production function nor its refining function. *Id.*, at 10,411. The Commission found that the statutory apportionment formula as applied by the Department "had the effect of imposing a tax on the [appellant's] exploration and on its refining net income, all of which was derived solely from operations outside the State of Wisconsin and which had no integral relationship to the [appellant's] marketing operations within Wisconsin." *Id.*, at 10,410. The Commission also found that taxation by Wisconsin of Exxon's net income from its exploration and production function and its refining function would subject

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[4] The additional net income was determined to be:

1965	$759,371
1966	$1,043,395
1967	$1,264,946
1968	$1,464,443

The additional taxes owed were determined to be:

1965	$52,960.97
1966	$72,842.65
1967	$88,351.22
1968	$102,316.01

appellant "to multiple-state taxation as to such income." *Ibid.* The Commission therefore concluded that the Department had erred in its application of the apportionment formula since it had included "extraterritorial income," but that "apportioning income earned by the [appellant] from its marketing function within and without the State of Wisconsin, would be proper. . . ." *Id.*, at 10,411.

The Circuit Court for Dane County set aside some of the factual findings and conclusions of law of the Tax Appeals Commission. CCH Wis. Tax Rep. ¶ 201–373, pp. 10,501–10,504 (1977). In particular, the Circuit Court held that the Commission's finding that Exxon's three main functional operating departments were separate unitary businesses was an erroneous conclusion of law. *Id.*, at 10,502. Similarly, the court set aside the findings that there was no economic dependence between the Wisconsin marketing operations and Exxon's exploration and production function or its refining function. *Ibid.* Instead the court held that "[t]he Wisconsin operation contributed sales to [Exxon's] business of producing, refining and marketing petroleum products. This contribution was sufficient alone in the opinion of this Court to make [Exxon's] business a unitary one." *Ibid.* Accordingly, appellant's business during the relevant years "considered as a whole both within and without Wisconsin constituted a unitary business" within the meaning of the apportionment statute. *Ibid.*

The Circuit Court concluded, however, that another statute, Wis. Stat. § 71.07 (1) (1967),[5] excluded from income subject to the apportionment formula all situs income derived

[5] Wisconsin Stat. § 71.07 (1) (1967) during this period provided in relevant part:

"For the purposes of taxation income or loss from business, not requiring apportionment under sub. (2), . . . shall follow the situs of the business from which derived. Income or loss derived from . . . the operation of any . . . mine . . . shall follow the situs of the property from which derived."

from appellant's oil and gas wells. CCH Wis. Tax Rep. ¶ 201–373, at 10,502–10,504. The Department had used a so-called "barrel formula" to separate two sets of income figures: income derived from the sale of crude oil to third parties, and income derived from crude oil produced by Exxon and transferred to its own refineries. The former was allocated to the situs State and excluded from Wisconsin taxable income, and the latter was included in the apportionment formula. A similar division was made of the income derived from appellant's gas production. The Circuit Court held that both sets of income were derived from the oil and gas wells and should be allocated to the situs State under the statute. The court noted that "there is no question but that the department's inclusion of [Exxon's] income derived from crude oil and gas produced and not sold to third parties by [Exxon's] production department resulted in double taxation of such income." [6] *Id.*, at 10,503.

The Wisconsin Supreme Court affirmed in part and reversed in part. 90 Wis. 2d 700, 281 N. W. 2d 94 (1979). That court concluded that the test for what constituted a unitary business was " 'whether or not the operation of the portion of the business within the state is dependent upon or contributory to the operation of the business outside the state. If there is such a relationship the business is unitary.' " *Id.*, at 711, 281 N. W. 2d, at 100, quoting G. Altman

[6] The Circuit Court also held that on remand the Tax Appeals Commission should determine whether the Department had properly weighted the apportionment formula. The apportionment formula uses three factors: sales, property, and manufacturing costs. See n. 3, *supra*. The Department adjusted the formula as to manufacturing costs because not all of the products sold through Exxon's Marketing Department were manufactured by Exxon; the Department divided by 2.6 rather than the statutory 3. The Wisconsin Supreme Court agreed that it was an issue for the Tax Appeals Commission on remand. 90 Wis. 2d 700, 731–735, 281 N. W. 2d 94, 111–113 (1979). That particular question is not before this Court.

& F. Keesling, Allocation of Income in State Taxation 101 (2d ed. 1950). Reviewing the organizational structure and business operations of Exxon, the court reasoned that Exxon's production and refining functions were dependent on its marketing operation to provide an outlet for its products, and Wisconsin was a part of that marketing system. In a high capital investment industry such as the petroleum industry, the court found, the existence of a stable marketing system was important for the full utilization of refining capacity. 90 Wis. 2d, at 718, 281 N. W. 2d, at 104. Accordingly, the court concluded that Exxon's Wisconsin marketing operations were an integral part of one unitary business and therefore its total corporate income was subject to the statutory apportionment formula. *Id.*, at 721–722, 281 N. W. 2d, at 105–106.

The Wisconsin Supreme Court disagreed with the Circuit Court on the issue of situs income. While the extraction and production of oil and gas constituted "mining" within the meaning of Wis. Stat. § 71.07 (1) (1967), 90 Wis. 2d, at 723, 281 N. W. 2d, at 106, the court agreed with the Department that situs income which is part of the unitary stream of income is nonetheless apportionable under the statute, while situs income which does not enter the unitary stream of income is nonapportionable and must be excluded from the formula. *Id.*, at 723–724, 281 N. W. 2d, at 106–107. The Wisconsin Supreme Court rejected appellant's contention that its separate functional accounting proved that its exploration and production income was earned totally outside Wisconsin, noting that "the idea of separate functional accounting seems to be incompatible with the 'very essence of formulary apportionment, namely, that where there are integrated, interdependent steps in the economic process carried on by a business enterprise, there is no logical or viable method for accurately separating out the profit attributable to one step in the economic process from other steps.'" *Id.*, at 726, 281 N. W. 2d, at 109, quoting J. Hellerstein, State and Local Taxation 400 (3d ed. 1969). The court concluded that the

State was acting within constitutional limitations despite appellant's evidence based on separate functional accounting.

The court also rejected Exxon's argument that the sources of income derived from exploration and production were all outside of Wisconsin and therefore could not be taxed in that State without impermissibly burdening interstate commerce. According to the court, Wisconsin was taxing only its "fair share" of appellant's income, there was a substantial nexus between appellant and the State, the tax was not claimed to discriminate between interstate and intrastate commerce, and the tax was fairly related to services provided by Wisconsin. 90 Wis. 2d, at 729–731, 281 N. W. 2d, at 110–111.

Because of the importance of the issues raised, we noted probable jurisdiction, 444 U. S. 961 (1979). We now affirm.

II

We recently set forth at some length the basic principles for state taxation of the income of a business operating in interstate commerce, see *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 436–442 (1980), and need not repeat them here in great detail. It has long been settled that "the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 460 (1959); *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, at 436. See generally *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920); *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123 (1931); *Butler Bros.* v. *McColgan*, 315 U. S. 501 (1942); *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267 (1978). See also *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271 (1924). The Due Process Clause of the Fourteenth Amendment imposes two requirements for such state taxation: a "minimal connection" or "nexus" between the interstate activities and the taxing State, and "a

rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Mobil Oil Corp.* v. *Commissioner of Taxes, supra,* at 436, 437. See *Moorman Mfg. Co.* v. *Bair, supra,* at 272–273; *National Bellas Hess, Inc.* v. *Department of Revenue,* 386 U. S. 753, 756 (1967); *Norfolk & Western R. Co.* v. *State Tax Comm'n,* 390 U. S. 317, 325 (1968). The tax cannot be "out of all appropriate proportion to the business transacted by the appellant in that State." *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell, supra,* at 135.

The nexus is established if the corporation "avails itself of the 'substantial privilege of carrying on business' within the State." *Mobil Oil Corp.* v. *Commissioner of Taxes, supra,* at 437, quoting *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444–445 (1940). In the present case, Exxon does not dispute that it avails itself of that privilege through its marketing operations within Wisconsin. Appellant contends, however, that this nexus is insufficient to permit inclusion of all of Exxon's corporate income within the apportionment formula. While appellant appears to concede that Wisconsin may properly apply its apportionment statute to Exxon's Marketing Department income as established by its separate functional accounting, see Brief for Appellant 18, 29, 33; Reply Brief for Appellant 2–3, it argues that it has demonstrated through its accounting method what portion of its income is derived from exploration and production and from refining—functions which do not occur in Wisconsin and of which the marketing operation in that State is not an integral part.

Appellant relies heavily on *Moorman Mfg. Co.* v. *Bair, supra.* The principal issue in that case was whether the single-factor sales formula used by Iowa to apportion for income tax purposes the income of an interstate business was prohibited by either the Due Process Clause or the Commerce Clause. In the course of that decision we noted that "[a]ppellant does not suggest that it has shown that a significant portion of the income attributed to Iowa in fact was gen-

erated by its Illinois operations; the record does not contain any separate accounting analysis showing what portion of appellant's profits was attributable to sales, to manufacturing, or to any other phase of the company's operations." 437 U. S., at 272. See also *id.*, at 275, n. 9. Exxon contends that *Moorman* sanctions the use of separate functional accounting in order to prove the extraterritorial reach of a state tax statute, and that its accounting in this case demonstrates that the Wisconsin Supreme Court's application of the state apportionment statute violates the Due Process Clause.

We cannot agree. As this Court has on several occasions recognized, a company's internal accounting techniques are not binding on a State for tax purposes. For example, in *Butler Bros.* v. *McColgan, supra,* an interstate business challenged the application of the California apportionment statute. The company was engaged in the wholesale dry goods and general merchandise business as a middleman, and it had distributing houses in seven States, including one in California. Each house maintained stocks of goods, had a cognizable territory, had its own sales force, did its own solicitation of sales, made its own credit and collection arrangements, and kept its own books. There was, however, a central buying division that was able to purchase goods for resale at a lower price. The company used "recognized accounting principles," 315 U. S., at 505, to allocate all costs and charges to each house, with certain centralized expenses allocated among the houses. Based on that "separate accounting system," *id.*, at 507, the business asserted there was no net income in California.

We concluded that California could constitutionally apply its apportionment formula to the company's total net income to establish taxable income, rather than being limited to the income shown by the taxpayer's accounting methods to be attributable to the one house in that State. The company had the "distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed,"

ibid., quoting *Norfolk & Western R. Co.* v. *North Carolina ex rel. Maxwell*, 297 U. S. 682, 688 (1936), and the taxpayer's accounting evidence was insufficient to meet that burden.

> "[W]e need not impeach the integrity of that accounting system to say that it does not prove appellant's assertion that extraterritorial values are being taxed. Accounting practices for income statements may vary considerably according to the problem at hand. . . . A particular accounting system, though useful or necessary as a business aid, may not fit the different requirements when a State seeks to tax values created by business within its borders. . . . That may be due to the fact, as stated by Mr. Justice Brandeis in *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 121, that a State in attempting to place upon a business extending into several States 'its fair share of the burden of taxation' is 'faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders.' Furthermore, the particular system used may not reveal the facts basic to the State's determination. *Bass, Ratcliff & Gretton, Ltd.* v. *Tax Commission, supra*, p. 283. In either aspect of the matter, the results of the accounting system employed by appellant do not impeach the validity or propriety of the formula which California has applied here." 315 U. S., at 507–508.

Similarly, in *Mobil Oil Corp.* v. *Commissioner of Taxes*, we noted that "separate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale." 445 U. S., at 438. Since such factors arise "from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source.' Although separate geographical

accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required." *Ibid.*[7]

The dicta in *Moorman* upon which appellant relies are not incompatible with these principles. In *Moorman* we simply noted that the taxpayer had made no showing that its Illinois operations were responsible for profits from sales in Iowa. This hardly leads to the conclusion, urged by Exxon here, that a taxpayer's separate functional accounting, if it purports to separate out income from various aspects of the business, must be accepted as a matter of constitutional law for state tax purposes. Such evidence may be helpful, but *Moorman* in no sense renders such accounting conclusive.[8]

The "linchpin of apportionability" for state income taxation of an interstate enterprise is the "unitary-business principle." *Mobil Oil Corp.* v. *Commissioner of Taxes, supra,* at 439. If a company is a unitary business, then a State may apply an apportionment formula to the taxpayer's total income in order to obtain a "rough approximation" of the corporate income that is "reasonably related to the activities conducted within the taxing State." *Moorman Mfg. Co.* v. *Bair,* 437 U. S., at 273. See also *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S., at 120. In order to exclude certain income from the apportionment formula, the company must prove that "the income was earned in the course of activities unrelated to the sale of petroleum products in that State." *Mobil Oil Corp.* v. *Commissioner of Taxes, supra,* at 439. The court looks to the "underlying economic realities of a

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[7] The fact that Exxon in the present case relies on its own separate *functional* accounting rather than separate *geographic* accounting, which it had used initially in preparing its Wisconsin income tax returns, does not make the principles expressed in *Mobil Oil Corp.* v. *Commissioner of Taxes* any less applicable.

[8] In reaching this conclusion we need not challenge the integrity of Exxon's separate functional accounting for its own internal purposes. See *Butler Bros* v. *McColgan,* 315 U. S. 501, 507 (1942).

unitary business," and the income must derive from "unrelated business activity" which constitutes a "discrete business enterprise," 445 U. S., at 441, 442, 439.

We agree with the Wisconsin Supreme Court that Exxon is such a unitary business and that Exxon has not carried its burden of showing that its functional departments are "discrete business enterprises" whose income is beyond the apportionment statute of the State. While Exxon may treat its operational departments as independent profit centers, it is nonetheless true that this case involves a highly integrated business which benefits from an umbrella of centralized management and controlled interaction.

As has already been noted, Exxon's Coordination and Services Management provided many essential corporate services for the entire company, including the coordination of the refining and other operational functions "to obtain an optimum short range operating program." App. 189. Many of the items sold by appellant in Wisconsin were obtained through a centralized purchasing office in Houston whose obvious purpose was to increase overall corporate profits through bulk purchases and efficient allocation of supplies among retailers. Cf. *Butler Bros.* v. *McColgan*, 315 U. S., at 508 ("the operation of the central buying division alone demonstrates that functionally the various branches are closely integrated"). Even the gasoline sold in Wisconsin was available only because of an exchange agreement with another company arranged by the Supply Department, part of Coordination and Services Management, and the Refining Department. Similarly, sales were facilitated through the use of a uniform credit card system, uniform packaging, brand names, and promotional displays, all run from the national headquarters.

The important link among the three main operating departments of appellant was stated most clearly in the

testimony of an Exxon senior vice president. This official testified:

> "[I]n any industry which is highly capital intensive, such as the petroleum industry, the fixed operating costs are highly relative to total operating costs, and for this reason the profitability of such an industry is very sensitive and directly related to the full utilization of the capacity of the facilities.
>
> "So, in the case of the petroleum industry it is—where you have high capital investments in refineries, the existence of an assured supply of raw materials and crude is important and the assured and stable outlet for products is important, and therefore when there are—when these segments are under a single corporate entity, it provides for some assurance that the risk of disruptions in refining operations are minimized due to supply and demand imbalances that may occur from time to time.
>
> . . . . .
>
> "[T]he placing individual segments under one corporate entity does provide greater profits stability for the reason that . . . nonparallel and nonmutual economic factors which may affect one department may be offset by the factors existing in another department." App. 224–225.

The evidence fully supports the conclusion of the court below that appellant's marketing operation in Wisconsin is an integral part of a unitary business. Exxon's use of separate functional accounting, and its decision for purposes of corporate accountability to assign wholesale market values to interdepartmental transfers of products and supplies, does not defeat the clear and sufficient nexus between appellant's interstate activities and the taxing State.

The same analysis disposes of the other prong of Exxon's Due Process Clause attack on the Wisconsin statute. Appellant contends that at least the income derived from explora-

tion and production must be treated as situs income and allocated to the situs State rather than included in the apportionment statute.[9] Appellee did in fact exclude that income derived from the sale of crude oil and gas at the wellhead to third parties. However, the Department of Revenue concluded that the income characterized through appellant's separate functional accounting as income derived from intracorporate transfer of crude oil and gas for refining was part of the "unitary stream" of Exxon's income and apportionable.

We agree with appellee. As previously noted, appellant's internal accounting system is not binding on the State for tax purposes. The decision to assign wholesale market values to internal transfers of raw materials for corporate accountability does not change the unitary nature of appellant's business. An effective marketing operation is important to assure full or nearly full use of the refining capacities. Obviously the quality of the refined product affects the marketing operation. And the success of the Exploration and Production Department helps to keep the refineries operating at a capacity which is cost-efficient. There is indeed a unitary stream of income, of which the income derived from internal transfers of raw materials from exploration and production to refining is a part.[10] There is a sufficient nexus to satisfy the Due Process Clause.

There is also the necessary "rational relationship" between the income attributed to the State by the apportionment for-

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[9] Exxon also appears to suggest that the state statute requires allocation to the situs State of such income rather than apportionment. See Brief for Appellant 31–32, 40–41. That, of course, is a matter of state statutory construction which the Wisconsin Supreme Court, as the final arbiter of that State's law, has decided against appellant.

[10] Since appellee determined that income derived from the sale of crude oil and gas at the wellhead to third parties must, under the state statute, be allocated to the situs State and excluded from the reach of the apportionment statute, we need not address the issue of whether the Due Process Clause would require such allocation rather than apportionment.

mula and the intrastate value of the business. Exxon had a total of $60,073,293 in sales income from its Wisconsin operation in the years 1965 through 1968. App. 799. The Wisconsin assessed taxable income for the four years in question represented 0.22 percent of total company net income adjusted to the Wisconsin basis, and Exxon's Wisconsin sales for those years represented 0.41 percent of total company sales. 90 Wis. 2d, at 729, 281 N. W. 2d, at 110. This is hardly a case where the State has used its formula to attribute income "out of all appropriate proportion to the business transacted . . . in that State," *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell*, 283 U. S., at 135, and application of the formula has not "led to a grossly distorted result," *Norfolk & Western R. Co.* v. *State Tax Comm'n*, 390 U. S., at 326. See also *Moorman Mfg. Co.* v. *Bair*, 437 U. S., at 274. That Exxon's Wisconsin marketing operation, through the use of separate geographic accounting, failed to show a net profit for the years in question does not change this rational relationship. *Butler Bros.* v. *McColgan*, 315 U. S., at 507–508; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S., at 284. Cf. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S., at 120. The Wisconsin Supreme Court's application of Wis. Stat. §§ 71.07 (1) and (2) (1967) in this case does not violate the Due Process Clause of the Fourteenth Amendment.

III

Appellant also contends that the Commerce Clause requires allocation of all income derived from its exploration and production function to the situs State rather than inclusion of such income in the apportionment formula.[11] The Court must therefore examine the "practical effect" of the tax to

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[11] Because of appellee's construction of the state statute involved, we do not here address the issue of whether the Commerce Clause requires allocation of income derived from the sale of crude oil and gas at the wellhead to third parties to the situs State rather than apportionment.

determine whether it " 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.' " *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S., at 443, quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977). See also *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 444–445 (1979); *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734, 750 (1978).

It has already been demonstrated that the necessary nexus is present and that the tax is fairly apportioned. Similarly, appellant does not contest the conclusion that the tax is fairly related to the services rendered by Wisconsin, which include police and fire protection, the benefit of a trained work force, and "the advantages of a civilized society." *Japan Line, Ltd.* v. *County of Los Angeles, supra*, at 445. Exxon asserts, however, that Wisconsin's taxing statute, as applied, subjects interstate business to an unfair burden of multiple taxation.

We were faced with a very similar argument in *Mobil Oil Corp.* v. *Commissioner of Taxes, supra*, and we reject it now for the same reasons we rejected it in that case. Here, as in that prior case, the State seeks to tax income, not property ownership. Similarly, it is the *risk* of multiple taxation that is being asserted; actual multiple taxation has not been shown.[12] While of course "the constitutionality of a [Wiscon-

[12] Appellant presses the argument here that the *risk* of multiple taxation of income violates the Commerce Clause. Brief for Appellant 46–48; Reply Brief for Appellant 15–18; Supplemental Brief for Appellant 8. There was testimony by one witness before the Tax Appeals Commission that some States imposed "severance taxes" on oil and gas production. App. 432. Based on this brief testimony, the Tax Appeals Commission concluded that application of the state apportionment formula to Exxon's net income from its exploration, production, and refining functions subjected that income to multiple taxation, CCH Wis. Tax Rep. ¶ 201–223, p. 10,410 (1976), and the Circuit Court for Dane County reached a similar result solely as to the exploration and production income, CCH Wis. Tax Rep. ¶ 201–373, p. 10,503 (1977). Severance taxes, however, are directed

sin] tax should not depend on the vagaries of [another State's] tax policy," nonetheless "the absence of any existing duplicative tax does alter the nature of appellant's claim." *Id.*, at 444. Exxon asserts, in essence, that the Commerce Clause requires allocation of exploration and production income to the situs State rather than apportionment among the States, regardless of the situs State's actual tax policy. Cf. *ibid.* (dividend income).

We do not agree. As was the case with income from intangibles, there is nothing "talismanic" about the concept of situs for income from exploration and production of crude oil and gas. *Id.*, at 445. Presumably, the States in which appellant's crude oil and gas production is located are permitted to tax in some manner the income derived from that production, there being an obvious nexus between the taxpayer and those States. However, "there is no reason in theory why that power should be exclusive when the [exploration and production income as distinguished through separate functional accounting] reflect[s] income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. These are the circumstances in which apportionment is ordinarily the accepted method." *Id.*, at 445–446.

In short, the Commerce Clause does not require that any income which a taxpayer is able to separate through account-

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at the gross value of the mineral extracted or the quantity of production rather than the net income derived from the production activities. See R. Sullivan, Handbook of Oil and Gas Law § 238, p. 490 (1955); 4 W. Summers, The Law of Oil and Gas § 801 (1938). See, *e. g.*, La. Rev. Stat. Ann. §§ 47:633 (7) and (9) (West Supp. 1980). The Wisconsin Supreme Court therefore properly concluded that "[t]he fact that the producing states may impose . . . severance taxes which have been held to be occupation taxes or property taxes does not render unfair or unconstitutional Wisconsin's efforts to reach a proportionate share of the taxpayer's income." 90 Wis. 2d, at 731, 281 N. W. 2d, at 110–111 (footnotes omitted).

ing methods and attribute to exploration and production of crude oil and gas be allocated to the States in which those production centers are located. The geographic location of such raw materials does not alter the fact that such income is part of the unitary business of the interstate enterprise and is subject to fair apportionment among all States to which there is a sufficient nexus with the interstate activities of the business.

The judgment of the Supreme Court of Wisconsin is

Affirmed.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

JENKINS *v.* ANDERSON, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-6809. Argued January 8, 1980—Decided June 10, 1980

At his trial in a Michigan state court for first-degree murder, petitioner testified that he acted in self-defense. On cross-examination, the prosecutor questioned petitioner about the fact that he was not apprehended until he surrendered to governmental authorities about two weeks after the killing, and in closing argument again referred to petitioner's prearrest silence, thereby attempting to impeach petitioner's credibility by suggesting that he would have spoken out if he had killed in self-defense. Petitioner was convicted of manslaughter, and after his conviction was affirmed in the state courts he sought habeas corpus relief in Federal District Court, contending that his constitutional rights were violated when the prosecutor questioned him concerning prearrest silence. The District Court denied relief, and the Court of Appeals affirmed.

Held:

1. The Fifth Amendment, as applied to the States through the Fourteenth Amendment, is not violated by the use of prearrest silence to impeach a criminal defendant's credibility. While the Fifth Amendment prevents the prosecution from commenting on the silence of a defendant who asserts the right to remain silent during his criminal trial, it is not violated when a defendant who testifies in his own defense is impeached with his prior silence. Impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truthfinding function of the criminal trial. Cf. *Raffel* v. *United States*, 271 U. S. 494; *Harris* v. *New York*, 401 U. S. 222; *Brown* v. *United States*, 356 U. S. 148. Pp. 235–238.

2. Nor does the use of prearrest silence to impeach a defendant's credibility deny him the fundamental fairness guaranteed by the Fourteenth Amendment. Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. And each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative. In this case, in which no governmental action induced petitioner to remain silent before arrest, *Doyle* v. *Ohio*, 426 U. S. 610, is inapplicable. Pp. 238–240.

3. A state court is not required to allow impeachment through the use of prearrest silence. Each jurisdiction is free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial. Pp. 240–241.

599 F. 2d 1055, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined; and in all but Part II of which STEWART, J., joined. STEWART, J., filed a statement concurring in part and concurring in the judgment, *post*, p. 241. STEVENS, J., filed an opinion concurring in the judgment, in Part I of which STEWART, J., joined, *post*, p. 241. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 245.

Carl Ziemba, by appointment of the Court, 444 U. S. 914, argued the cause and filed a brief for petitioner.

Robert A. Derengoski, Solicitor General of Michigan, argued the cause for respondent. With him on the brief were *Frank J. Kelley*, Attorney General, and *Thomas L. Casey*, Assistant Attorney General.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the use of prearrest silence to impeach a defendant's credibility violates either the Fifth or the Fourteenth Amendment to the Constitution.

I

On August 13, 1974, the petitioner stabbed and killed Doyle Redding. The petitioner was not apprehended until he turned himself in to governmental authorities about two weeks later. At his state trial for first-degree murder, the petitioner contended that the killing was in self-defense.

The petitioner testified that his sister and her boyfriend were robbed by Redding and another man during the evening of August 12, 1974. The petitioner, who was nearby when the robbery occurred, followed the thieves a short distance and reported their whereabouts to the police. According to the petitioner's testimony, the next day he encountered Red-

ding, who accused him of informing the police of the robbery. The petitioner stated that Redding attacked him with a knife, that the two men struggled briefly, and that the petitioner broke away. On cross-examination, the petitioner admitted that during the struggle he had tried "[t]o push that knife in [Redding] as far as [I] could," App. 36, but maintained that he had acted solely in self-defense.

During the cross-examination, the prosecutor questioned the petitioner about his actions after the stabbing:

> "Q. And I suppose you waited for the Police to tell them what happened?
> "A. No, I didn't.
> "Q. You didn't?
> "A. No.
> "Q. I see.
> "And how long was it after this day that you were arrested, or that you were taken into custody?" *Id.*, at 33.

After some discussion of the date on which petitioner surrendered, the prosecutor continued:

> "Q. When was the first time that you reported the things that you have told us in Court today to anybody?
> "A. Two days after it happened.
> "Q. And who did you report it to?
> "A. To my probation officer.
> "Q. Well, apart from him?
> "A. No one.
> "Q. Who?
> "A. No one but my—
> "Q. (Interposing) Did you ever go to a Police Officer or to anyone else?
> "A. No, I didn't.
> "Q. As a matter of fact, it was two weeks later, wasn't it?
> "A. Yes." *Id.*, at 34.

In closing argument to the jury, the prosecutor again referred to the petitioner's prearrest silence. The prosecutor noted that petitioner had "waited two weeks, according to the testimony—at least two weeks before he did anything about surrendering himself or reporting [the stabbing] to anybody." *Id., at* 43. The prosecutor contended that the petitioner had committed murder in retaliation for the robbery the night before.

The petitioner was convicted of manslaughter and sentenced to 10 to 15 years' imprisonment in state prison. The Michigan Court of Appeals affirmed the conviction, and the Michigan Supreme Court denied leave to appeal. The petitioner then sought a writ of habeas corpus from the Federal District Court for the Eastern District of Michigan, contending that his constitutional rights were violated when the prosecutor questioned him concerning prearrest silence. A Federal Magistrate concluded that the petition for habeas corpus relief should be denied. The District Court adopted the Magistrate's recommendation. The United States Court of Appeals for the Sixth Circuit affirmed. 599 F. 2d 1055. This Court granted a writ of certiorari. 444 U. S. 824 (1979). We now affirm.[1]

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[1] The petitioner did not raise his constitutional claims during his state-court trial. Thus, the respondent argues that the rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), bars consideration of the petitioner's habeas petition. But the respondent failed to raise the *Sykes* question in either the District Court or the Court of Appeals. Ordinarily, we will not consider a claim that was not presented to the courts below. See *Dorszynski* v. *United States*, 418 U. S. 424, 431, n. 7 (1974). Considerations of judicial efficiency demand that a *Sykes* claim be presented before a case reaches this Court. The applicability of the *Sykes* "cause"-and-"prejudice" test may turn on an interpretation of state law. See *Rummel* v. *Estelle*, 445 U. S. 263, 267, n. 7 (1980). This Court's resolution of such a state-law question would be aided significantly by the views of other federal courts that may possess greater familiarity with Michigan law. Furthermore, application of the "cause"-and-"prejudice" standard may

II

At trial the prosecutor attempted to impeach the petitioner's credibility by suggesting that the petitioner would have spoken out if he had killed in self-defense. The petitioner contends that the prosecutor's actions violated the Fifth Amendment as applied to the States through the Fourteenth Amendment. The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial, and prevents the prosecution from commenting on the silence of a defendant who asserts the right. *Griffin* v. *California*, 380 U. S. 609, 614 (1965). In this case, of course, the petitioner did not remain silent throughout the criminal proceedings. Instead, he voluntarily took the witness stand in his own defense.

This Court's decision in *Raffel* v. *United States*, 271 U. S. 494 (1926), recognized that the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence. The defendant in *Raffel* was tried twice. At the first trial, a Government agent testified that Raffel earlier had made an inculpatory statement. The defendant did not testify. After the first trial ended in deadlock the agent repeated his testimony at the second trial, and Raffel took the stand to deny making such a statement. Cross-examination revealed that Raffel had not testified at the first trial. *Id.*, at 495, n. The Court held that inquiry into prior silence was proper because "[t]he immunity from giving testimony is one which the defendant may waive by offering himself as a witness. . . . When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined. . . ." *Id.*, at 496–497. Thus, the *Raffel* Court concluded that the defendant was "subject to cross-examina-

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turn on factual findings that should be made by a district court. Accordingly, we do not consider the *Sykes* issue in this case.

tion impeaching his credibility just like any other witness." *Grunewald* v. *United States*, 353 U. S. 391, 420 (1957).[2]

It can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him. But the Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 30 (1973). See *Corbitt* v. *New Jersey*, 439 U. S. 212, 218, and n. 8 (1978). The "'threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.'" *Chaffin* v. *Stynchcombe*, *supra*, at 32, quoting *Crampton* v. *Ohio*, decided with *McGautha* v. *California*, 402 U. S. 183, 213 (1971).[3] The *Raffel* Court ex-

[2] In *Raffel*, the defendant's decision not to testify at his first trial was an invocation of his right to remain silent protected by the Fifth Amendment. In this case, the petitioner remained silent before arrest, but chose to testify at his trial. Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment. We simply do not reach that issue because the rule of *Raffel* clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent.

[3] In *Crampton* v. *Ohio*, the Court considered a claim that a murder defendant's right to remain silent was burdened unconstitutionally because he could not argue for mitigation of punishment without risking incrimination on the question of guilt. The Court recognized that a defendant who speaks in his own defense cannot avoid testifying fully.

"It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. See, *e. g.*, *Brown* v. *Walker*, 161 U. S. 591, 597–598 (1896); *Fitzpatrick* v. *United States*, 178 U. S. 304, 314–316 (1900); *Brown* v. *United States*, 356 U. S. 148 (1958). It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. See *Spencer* v. *Texas*, 385 U. S. [554, 561 (1967)]; cf. *Michelson* v. *United States*, 335 U. S. 469 (1948); but cf. *Luck* v. *United States*, 121 U. S.

plicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights. "We are unable to see that the rule that [an accused who] testifies . . . must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not." 271 U. S., at 499.[4]

This Court similarly defined the scope of the Fifth Amendment protection in *Harris* v. *New York*, 401 U. S. 222 (1971). There the Court held that a statement taken in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), may be used to impeach a defendant's credibility. Rejecting the contention that such impeachment violates the Fifth Amendment, the Court said:

> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege

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App. D. C. 151, 348 F. 2d 763 (1965); *United States* v. *Palumbo*, 401 F. 2d 270 (CA2 1968)." 402 U. S., at 215.

The Court concluded that "the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt." *Id.*, at 217. Subsequently, a petition for rehearing in *Crampton* was granted and the underlying state-court decision was vacated on Eighth Amendment grounds. 408 U. S. 941 (1972).

[4] Both MR. JUSTICE STEVENS, *post*, at 241–242, n. 2, and MR. JUSTICE MARSHALL, *post*, at 252, suggest that the constitutional rule of *Raffel* was limited by later decisions of the Court. In fact, no Court opinion decided since *Raffel* has challenged its holding that the Fifth Amendment is not violated when a defendant is impeached on the basis of his prior silence. In *United States* v. *Hale*, 422 U. S. 171, 175, n. 4 (1975), the Court expressly declined to consider the constitutional question. The decision in *Stewart* v. *United States*, 366 U. S. 1 (1961), was based on federal evidentiary grounds, not on the Fifth Amendment. The Court in *Grunewald* v. *United States*, 353 U. S. 391, 421 (1957), stated that it was not required to re-examine *Raffel*. In all three cases, the Court merely considered the question whether, as a matter of federal evidentiary law, prior silence was sufficiently inconsistent with present statements as to be admissible. See also n. 5, *infra*.

> cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." 401 U. S., at 225.

See also *Oregon* v. *Hass*, 420 U. S. 714, 721–723 (1975); *Walder* v. *United States*, 347 U. S. 62, 65 (1954).

In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice. See *Chaffin* v. *Stynchcombe*, *supra*, at 32, and n. 20. Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown* v. *United States*, 356 U. S. 148, 156 (1958).

Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility.

III

The petitioner also contends that use of prearrest silence to impeach his credibility denied him the fundamental fairness guaranteed by the Fourteenth Amendment. We do not

agree. Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A J. Wigmore, Evidence § 1042, p. 1056 (Chadbourn rev. 1970). Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative. For example, this Court has exercised its supervisory powers over federal courts to hold that prior silence cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to the defendant might result. See *United States* v. *Hale*, 422 U. S. 171, 180–181 (1975); *Stewart* v. *United States*, 366 U. S. 1, 5 (1961); *Grunewald* v. *United States*, 353 U. S., at 424.[5]

Only in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), did we find that impeachment by silence violated the Constitution. In that case, a defendant received the warnings required by *Miranda* v. *Arizona*, *supra*, at 467–473, when he was arrested for selling marihuana. At that time, he made no statements to the police. During his subsequent trial, the defendant testified that he had been framed. The prosecutor impeached the defendant's credibility on cross-examination by revealing that the defendant remained silent after his arrest. The State argued that the prosecutor's actions were permissible, but we concluded that "the *Miranda* decision compels rejection of the State's position." 426 U. S., at 617. *Miranda*

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[5] MR. JUSTICE MARSHALL contends that the petitioner's prearrest silence is not probative of his credibility. *Post*, at 248–250. In this case, that is a question of state evidentiary law. In a federal criminal proceeding the relevance of such silence, of course, would be a matter of federal law. See *United States* v. *Hale*, *supra*, at 181. MR. JUSTICE MARSHALL's further conclusion that introduction of the evidence in this trial violated due process relies upon the Court's reasoning in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), and *United States* v. *Hale*. *Post*, at 246–250. But the Court's decision in *Hale* rested upon nonconstitutional grounds, see n. 4, *supra*, and *Doyle* is otherwise distinguishable, see *infra*, at 240.

warnings inform a person that he has the right to remain silent and assure him, at least implicitly, that his subsequent decision to remain silent cannot be used against him. Accordingly, " 'it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.' " *Id.*, at 619, quoting *United States* v. *Hale, supra,* at 182–183 (WHITE, J., concurring in judgment).[6]

In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case. We hold that impeachment by use of prearrest silence does not violate the Fourteenth Amendment.

IV

Our decision today does not force any state court to allow impeachment through the use of prearrest silence. Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial. We merely conclude that the use of prearrest silence to impeach a defendant's credibility does not

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[6] The Court reached a similar result in *Johnson* v. *United States,* 318 U. S. 189 (1943). A trial judge mistakenly told a defendant that he could claim the privilege against self-incrimination. After the defendant invoked the privilege, the prosecutor commented on the defendant's refusal to speak. Under its supervisory power, this Court held that the prosecutor's comments constituted error because the trial court had assured the defendant that he might claim the protections of the Fifth Amendment. The Court stated that "[e]lementary fairness requires that an accused should not be misled on that score." *Id.*, at 197; see *Doyle* v. *Ohio, supra,* at 618, n. 9. See also *Raley* v. *Ohio,* 360 U. S. 423, 437–438 (1959).

violate the Constitution. The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART concurs in the judgment, agreeing with all but Part II of the opinion of the Court, and with Part I of the opinion of MR. JUSTICE STEVENS concurring in the judgment.

MR. JUSTICE STEVENS, concurring in the judgment.

My approach to both of petitioner's constitutional claims differs from the Court's. I would reject his Fifth Amendment claim because the privilege against compulsory self-incrimination [1] is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak. I would reject his due process claim for the reasons stated in my dissenting opinion in *Doyle* v. *Ohio*, 426 U. S. 610, 620.

I

The Court holds that a defendant who elects to testify in his own behalf waives any Fifth Amendment objection to the use of his prior silence for the purpose of impeachment. As the Court correctly points out, this holding is squarely supported by *Raffel* v. *United States*, 271 U. S. 494, in which the Court upheld the use of a defendant's failure to take the stand at his first trial to impeach his testimony on retrial. Nevertheless, I would not rely on *Raffel* because such reliance incorrectly implies that a defendant's decision not to testify at his own trial is constitutionally indistinguishable from his silence in a precustody context.[2] But the two situations are fundamentally different.

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[1] The Fifth Amendment provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[2] Moreover, there is a serious question about the continuing vitality of *Raffel*. In *Johnson* v. *United States*, 318 U. S. 189, 199, the Court stated that when a trial judge "grants the claim of privilege but allows

In the trial context it is appropriate to presume that a defendant's silence is an exercise of his constitutional privilege and to prohibit any official comment that might deter him from exercising that privilege.[3] For the central purpose of the Fifth Amendment privilege is to protect the defendant from being compelled to testify against himself at his own trial.[4] Moreover, since a defendant's decision whether to tes-

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it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers."

In *Grunewald* v. *United States*, 353 U. S. 391, 415–424, the Court held that it was error to permit the prosecutor, when cross-examining the defendant at trial, to use his assertion of the Fifth Amendment privilege while a witness before the grand jury for impeachment. In effect, the Court limited *Raffel* to cases in which the probative value of the cross-examination outweighed its possible impermissible effect on the jury; see 353 U. S., at 420–421. Because the Court held the probative value of the assertion of privilege to be negligible on the issue of the defendant's credibility, it was "not faced with the necessity of deciding whether *Raffel* has been stripped of vitality by the later *Johnson* case, *supra*, or of otherwise re-examining *Raffel*." *Id.*, at 421. Mr. Justice Black, writing for four Justices, would have expressly overruled *Raffel*. He could "think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." 353 U. S., at 425.

See also *Stewart* v. *United States*, 366 U. S. 1, 5–7; *United States* v. *Hale*, 422 U. S. 171, 175, n. 4.

[3] "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin* v. *California*, 380 U. S. 609, 614 (footnote omitted).

[4] "The Fifth Amendment protects the individual's right to remain silent. The central purpose of the privilege against compulsory self-incrimination is to avoid unfair criminal trials. It is an expression of our conviction that the defendant in a criminal case must be presumed innocent, and that the State has the burden of proving guilt without resorting to an

tify is typically based on the advice of his counsel, it often could not be explained without revealing privileged communications between attorney and client.

These reasons have no application in a prearrest context. The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would normally speak out.[5] When a citizen is under no official compulsion what-

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inquisition of the accused." *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 810 (STEVENS, J., dissenting) (footnote omitted).

"The Fifth Amendment itself is predicated on the assumption that there are innocent persons who might be found guilty if they could be compelled to testify at their own trials. Every trial lawyer knows that some truthful denials of guilt may be considered incredible by a jury—either because of their inherent improbability or because their explanation, under cross-examination, will reveal unfavorable facts about the witness or his associates. The Constitution therefore gives the defendant and his lawyer the absolute right to decide that the accused shall not become a witness against himself." *Lakeside* v. *Oregon*, 435 U. S. 333, 343 (STEVENS, J., dissenting) (footnote omitted).

[5] There is, of course, no reason why we should encourage the citizen to conceal criminal activity of which he has knowledge. In *Roberts* v. *United States*, 445 U. S. 552, 557–558, we pointed out:

"Concealment of crime has been condemned throughout our history. The citizen's duty to 'raise the "hue and cry" and report felonies to the authorities,' *Branzburg* v. *Hayes*, 408 U. S. 665, 696 (1972), was an established tenet of Anglo-Saxon law at least as early as the 13th century. 2 W. Holdsworth, History of English Law 101–102 (3d ed. 1927); 4 *id.*, at 521–522; see Statute of Westminster First, 3 Edw. 1, ch. 9, p. 43 (1275); Statute of Westminster Second, 13 Edw. 1, chs. 1, 4, and 6, pp. 112–115 (1285). The first Congress of the United States enacted a statute imposing criminal penalties upon anyone who, 'having knowledge of the actual commission of [certain felonies,] shall conceal, and not as soon as may be disclose and make known the same to [the appropriate] authority. . . .' Act of Apr. 30, 1790, § 6, 1 Stat. 113. Although the term 'misprision

ever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment.[6] For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment. See n. 1, *supra*. Consequently, I would simply hold that the admissibility of petitioner's failure to come forward with the excuse of self-defense shortly after the stabbing raised a routine evidentiary question that turns on the probative significance of that evidence and presented no issue under the Federal Constitution.[7]

II

For the reasons stated in Part I of my dissenting opinion in *Doyle* v. *Ohio*, 426 U. S., at 620–626, I do not agree with the Court's view that the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436, 479, contain an implicit assurance that subsequent silence may not be used against the defendant.

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of felony' now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.

"This deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination, . . . the criminal defendant no less than any other citizen is obliged to assist the authorities." (Footnote omitted.)

[6] "Petitioner insists that he had a constitutional right to remain silent and that no adverse inferences can be drawn from the exercise of that right. We find this argument singularly unpersuasive. The Fifth Amendment privilege against compelled self-incrimination is not self-executing. At least where the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion." *Roberts* v. *United States*, *supra*, at 559.

[7] Under my approach, assuming relevance, the evidence could have been used not only for impeachment but also in rebuttal even had petitioner not taken the stand.

See *ante*, at 239–240. As the Court actually acknowledged in *Doyle* itself, see 426 U. S., at 619–620, n. 11, any such implicit assurance is far from being unqualified.[8] Moreover, I continue to disagree with the Court's view, repeated today, *ante*, at 240, that there was "fundamental unfairness present in *Doyle*." In my judgment the fairness or unfairness of using a defendant's postarrest silence for impeachment purposes does not simply depend on whether or not he received *Miranda* warnings. Rather, it primarily depends on whether it is fair to infer that the defendant was silent because he was asserting his constitutional privilege.[9]

In any event, since I was unpersuaded by the due process rationale of *Doyle*,[10] I readily concur in the Court's rejection of a similar argument in this case.

MR. JUSTICE STEWART concurs in Part I of this opinion.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Today the Court holds that a criminal defendant's testimony in his own behalf may be impeached by the fact that

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[8] It is interesting to note that MR. JUSTICE MARSHALL and MR. JUSTICE BRENNAN share my view that the *Miranda* warnings in *Doyle* did not create the right to remain silent or create an otherwise unavailable objection to the use of the defendants' silence for impeachment purposes. See *post*, at 247–248, n. 1. I do not, however, agree with their assumption that a holding that evidence of silence is admissible necessarily rests on the premise that a quiet person has any duty to speak. See *post*, at 250–251, n. 4. A dog's failure to bark may be probative whether or not he has been trained as a watchdog. Cf. A. Conan Doyle, Silver Blaze, in The Complete Sherlock Holmes (1938).

[9] Generally, in the absence of an express assertion of the privilege, the presumption is that the privilege was not exercised. See *Roberts* v. *United States*, *supra*, at 559–560.

[10] It strikes me as anomalous that, assuming *Raffel* v. *United States*, 271 U. S. 494, has survived *Doyle*, a defendant who takes the stand is deemed to waive his Fifth Amendment objection to the use of his pretrial silence,

he did not go to the authorities before his arrest and confess his part in the offense. The decision thus strikes a blow at two of the foundation stones of our constitutional system: the privilege against self-incrimination and the right to present a defense.

I

The Court's decision today is extraordinarily broad. It goes far beyond a simple holding that the common-law rule permitting introduction of evidence of silence in the face of accusation or in circumstances calling for a response does not violate the privilege against self-incrimination. For in this case the prosecution was allowed to cast doubt on an accused's testimony that he acted in self-defense by forcing him to testify that he did not go to the police of his own volition, before he had been indicted, charged, or even accused of any offense, and volunteer his version of the events.

The Court's holding that a criminal defendant's testimony may be impeached by his prearrest silence has three patent—and, in my view, fatal—defects. First, the mere fact of prearrest silence is so unlikely to be probative of the falsity of the defendant's trial testimony that its use for impeachment purposes is contrary to the Due Process Clause of the Fourteenth Amendment. Second, the drawing of an adverse inference from the failure to volunteer incriminating statements impermissibly infringes the privilege against self-incrimination. Third, the availability of the inference for impeachment purposes impermissibly burdens the decision to exercise the constitutional right to testify in one's own defense.

A

The use of prior silence for impeachment purposes depends, as the majority recognizes, *ante*, at 238, on the reasonableness

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but not to waive what I regard as a much less focussed, and hence weaker, due process objection. Perhaps the Court's opinion can best be understood by assuming that *Raffel* is not good law on its facts under the *Doyle* rationale.

of an inference that it is inconsistent with the statements that are to be impeached. If the defendant's prior silence does not make it more likely that his trial testimony was false, the evidence is simply irrelevant. Such an inference cannot fairly be drawn from petitioner's failure to go to the police before any charges were brought, admit that he had committed a homicide, and offer an exculpatory explanation.

In order for petitioner to offer his explanation of self-defense, he would necessarily have had to admit that it was he who fatally stabbed the victim, thereby supplying against himself the strongest possible proof of an essential element of criminal homicide. It is hard to imagine a purer case of self-incrimination. Since we cannot assume that in the absence of official warnings individuals are ignorant of or oblivious to their constitutional rights, we must recognize that petitioner may have acted in reliance on the constitutional guarantee. In fact, petitioner had most likely been informed previously of his privilege against self-incrimination, since he had two prior felony convictions. App. 28. One who has at least twice before been given the *Miranda* warnings, which carry the implied promise that silence will not be penalized by use for impeachment purposes, *Doyle* v. *Ohio*, 426 U. S. 610 (1976), may well remember the rights of which he has been informed, and believe that the promise is still in force. Accordingly, the inference that petitioner's conduct was inconsistent with his exculpatory trial testimony is precluded. See *Doyle* v. *Ohio*, *supra*; *United States* v. *Hale*, 422 U. S. 171, 176–177 (1975).[1]

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[1] See also E. Cleary, McCormick on Evidence § 161, pp. 355–356 (2d ed. 1972). For this reason I would not reach a different result from that of *Doyle* v. *Ohio* simply because in *Doyle* the defendant had received the *Miranda* warnings. The furnishing of the *Miranda* warnings does not create the right to remain silent; that right is conferred by the Constitution. I have no doubt that if an accused were interrogated in police custody without receiving the *Miranda* warnings and remained silent, that silence would be inadmissible despite the lack of warnings. In that situa-

Moreover, other possible explanations for silence spring readily to mind. It is conceivable that a person who had acted in self-defense might believe that he had committed no crime and therefore had no call to explain himself to the police. Indeed, all the witnesses agreed that after the stabbing the victim ran across the street and climbed a flight of stairs before collapsing. Initially, at least, then, petitioner might not have known that there was a homicide to explain. Moreover, petitioner testified that he feared retaliation if he went to the police. One need not be persuaded that any of these possible explanations represents the true reason for petitioner's conduct to recognize that the availability of other plausible hypotheses vitiates the inference on which the admissibility of the evidence depends. See *United States* v. *Hale, supra,* at 176–177, 180.

The Court implies that its decision is consistent with the practice at common law; but at common law silence is admissible to contradict subsequent statements only if the circumstances would naturally have called for a response. For example, silence was traditionally considered a tacit admission

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tion, no less than under the facts of *Doyle,* silence is "insolubly ambiguous." 426 U. S., at 617. Thus, properly considered, the use in *Doyle* of post-arrest silence for impeachment purposes was fundamentally unfair not because it broke an implied promise by a single narcotics agent, but because it broke a promise made by the United States Constitution. Similarly, persons who are not taken into police custody may rely on their privilege not to incriminate themselves in failing to report their conduct to the police. Such silence is also "insolubly ambiguous."

I do not regard the facts of *Doyle* and this case as analytically indistinguishable, however, for in *Doyle* the possibility that the defendant may have known his constitutional rights became a certainty when he was informed of those rights by the police. I simply believe that in both cases, the existence of the privilege against self-incrimination renders the probative value of the accused's silence so negligible that, in view of its plainly prejudicial effect, the use of that silence for impeachment purposes violates the defendant's federal right to due process. That is why I disagree with the Court's statement that the lack of probativeness of the evidence was merely "a question of state evidentiary law." *Ante,* at 239, n. 5.

if a statement made in the party's presence was heard and understood by the party, who was at liberty to respond, in circumstances naturally calling for a response, and the party failed to respond.[2] Silence was not considered an admission if any of the prerequisites were absent, for in such a case the failure to speak could be explained other than as assent. Similarly, failure to assert a fact could be used for impeachment if it would have been natural, under the circumstances, to assert the fact. But the authority cited by the majority in support of this proposition, *ante*, at 239, makes it clear that the rule cannot be invoked unless the facts affirmatively show that the witness was called on to speak, circumstances which are not present in this case.[3] As we have previously observed, "[i]n most circumstances silence is so ambiguous that it is of little probative force." *United States* v. *Hale*, *supra*, at 176.

Since petitioner's failure to report and explain his actions prior to his arrest was not probative of the falsity of his testimony at trial, it was fundamentally unfair and a deprivation

[2] See, *e. g.*, McCormick, *supra* n. 1, §§ 161, 270; 4 J. Wigmore, Evidence §§ 1071, 1072 (J. Chadbourn rev. 1970); Gamble, The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Abandonment, 14 Ga. L. Rev. 27 (1979); Brody, Admissions Implied from Silence, Evasion and Equivocation in Massachusetts Criminal Cases, 42 B. U. L. Rev. 46 (1962); Heller, Admissions by Acquiescence, 15 U. Miami L. Rev. 161 (1960); Note, Tacit Criminal Admissions, 112 U. Pa. L. Rev. 210 (1963).

[3] The Wigmore treatise lists three categories of cases in which silence may be used for impeachment:

"(1) Omissions *in legal proceedings* to assert what would naturally have been asserted under the circumstances.

"(2) Omissions to assert anything . . . *when formerly narrating*, on the stand or elsewhere, the matter now dealt with.

"(3) *Failure to take the stand* at all. . . ." 3A Wigmore, *supra*, § 1042, pp. 1056–1058 (footnotes omitted, emphasis in original).

Plainly, the omission to seek out an opportunity to speak is not included within these categories. Of all the cases cited by Wigmore involving silence by a criminal defendant, not one involves prearrest silence by a suspect not in the presence of law enforcement officers.

of due process to allow the jury to draw from that silence an inference that his trial testimony was false. *Doyle* v. *Ohio*, *supra*.

B

The use of prearrest silence for impeachment purposes also violates the privilege against self-incrimination secured by the Fifth and Fourteenth Amendments. The privilege prohibits the government from imposing upon citizens any duty to present themselves to the authorities and report their own wrongdoing. See, *e. g.*, *Marchetti* v. *United States*, 390 U. S. 39 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968); *Haynes* v. *United States*, 390 U. S. 85 (1968); *Albertson* v. *SACB*, 382 U. S. 70 (1965). As I have explained, in order to offer his exculpatory explanation petitioner would inevitably have had to incriminate himself as to facts that would be crucial in any subsequent prosecution. To penalize him for failing to relinquish his privilege against self-incrimination by permitting the jury to draw an adverse inference from his silence is to place an impermissible burden on his exercise of the privilege. See *Griffin* v. *California*, 380 U. S. 609 (1965). In practical effect, it replaces the privilege against self-incrimination with a duty to incriminate oneself. The Court attempts to avoid this conclusion by asserting that the burden does not threaten the purposes underlying the Fifth Amendment. See *ante*, at 236. But it is hard to see how the burden could be more substantial or direct.[4]

[4] I confess I find MR. JUSTICE STEVENS' view of the Fifth Amendment incomprehensible. Apparently, under that view, a person's right not to incriminate himself exists only if the government has already attempted to compel him to do so. See *ante*, at 243–244 (opinion concurring in judgment). If no officials have tried to get the person to speak, he evidently has a duty to incriminate himself, because the reporting of crime is a civic duty and the Fifth Amendment is not applicable since the decision to speak or remain silent is, at that time, "voluntary." See *ante*, at 244.

But the prohibition against compelled self-incrimination is another way of expressing the right not to incriminate oneself. See, *e. g.*, *United States* v. *Burr*, 25 F. Cas. 38, 39 (No. 14,692e) (CC Va. 1807) ("It is a

It is sophistry to assert that the use of prearrest silence for impeachment does not infringe the privilege against self-incrimination because the fact of the silence will not come out unless petitioner chooses to testify, see *ante*, at 238. An accused has the absolute right to testify in his own defense, as well as the absolute right to refuse to incriminate himself prior to trial. He may not be forced to choose between those fundamental guarantees. We may not ignore the commands of the Constitution by asserting that the defendant brought his difficulties on himself by exercising the precious right to present a defense. Nor should we piously proclaim the protection of individual liberties but extend that protection only to the prosecution's case in chief while ensuring that the evidence can come before the jury by the back door. See *Harris* v.

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settled maxim of law that no man is bound to criminate himself"). After all, the only means of compelling a person to incriminate himself is to penalize him if he does not. Of course the voluntary decision to remain silent in the absence of any official compulsion does not "raise any issue under the Fifth Amendment," *ante*, at 244 (STEVENS, J., concurring in judgment), since there has been no self-incrimination at all. A voluntary decision to speak also does not implicate the Fifth Amendment because the self-incrimination was not compelled. But to impose a duty to report one's own crime before an official accusation has been made would itself be to compel self-incrimination, thus bringing the Fifth Amendment into play. And, as *Griffin* v. *California*, 380 U. S. 609 (1965), makes plain, the Constitution also prohibits the government from burdening the right not to incriminate oneself by penalizing silence. In the present case the violation of the Fifth Amendment occurred not when the defendant remained silent, but when that silence was later used against him at his criminal trial.

MR. JUSTICE STEVENS relies heavily on *Roberts* v. *United States*, 445 U. S. 552 (1980). That case held that a more severe sentence could be imposed on a defendant as a result of his refusal to provide information about criminal activities of *other* persons. The Court rejected Roberts' Fifth Amendment claim on grounds plainly inapplicable to this case: "At least where the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion." *Id.*, at 559; but see *id.*, at 565–566 (MARSHALL, J., dissenting).

New York, 401 U. S. 222, 226–232 (1971) (BRENNAN, J., dissenting).

The Court's reasoning is not saved by its reliance on *Raffel* v. *United States*, 271 U. S. 494 (1926). *Raffel* held that a defendant could be required, upon testifying at a retrial, to disclose his failure to testify at the earlier trial. In my view, *Raffel* was wrongly decided; our subsequent cases, without expressly overruling it, limited it so severely as to appear to rob it of any continued vitality until its resurrection today. In *Grunewald* v. *United States*, 353 U. S. 391 (1957), the Court read *Raffel* as holding simply that a defendant who testifies at a second trial cannot continue to take advantage of the privilege asserted at the first trial. Instead, by taking the stand the defendant "becomes subject to cross-examination impeaching his credibility just like any other witness." 353 U. S., at 420. But *Grunewald* carefully pointed out that "[t]he Court, in *Raffel*, did not focus on the question whether the cross-examination there involved was in fact probative in impeaching the defendant's credibility." *Ibid.* The logical underpinnings of *Raffel* were cut away almost completely by *Griffin* v. *California*, 380 U. S. 609 (1965).[5] Thus the majority's statement that *Raffel* holds that "the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence," *ante*, at 235, is both simplistic and overbroad.

[5] Mr. Justice Black's concurring opinion for four Members of the Court in *Grunewald*, which he would have decided on constitutional grounds rather than under the Court's supervisory powers, eloquently foreshadowed the reasoning of *Griffin*:

"I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution." *Grunewald* v. *United States*, 353 U. S. 391, 425–426 (1957).

Further, the Court implies most unfairly that to exclude evidence of petitioner's prior silence would be to countenance perjury. See *ante*, at 237–238. The Court quotes from *Harris* v. *New York*, *supra*, but in that case the defendant made two contradictory statements at different times. It was logical to infer, absent an explanation to the contrary, that the defendant was lying on one occasion or the other. See also *Walder* v. *United States*, 347 U. S. 62 (1954). Here there is only one statement, and a silence which is not necessarily inconsistent with the statement. There is no basis on which to conjure up the specter of perjury.

C

Finally, impeachment by prearrest silence impermissibly burdens the constitutionally protected decision to testify in one's own defense.

Under today's decision a defendant who did not report his conduct to the police at the first possible moment must, in deciding whether to testify in his own defense, take into account the possibility that if he does testify the jury may be permitted to add that omission to the reasons for disbelieving his defense. This means that a person who thinks he may have done something wrong must immediately decide, most likely without the assistance of counsel, whether, if he is ever charged with an offense and brought to trial, he may wish to take the stand. For if he may later want to take the stand, he had better go to the police station right away to preserve his exculpatory explanation of the events—even though in so doing he must incriminate himself and provide evidence which may be crucial to his eventual conviction. But if he decides not to incriminate himself, he may anticipate that his right to testify in his own defense will be undermined by the argument that his story is probably untrue because he did not volunteer it to the police at the earliest opportunity. All of these strategic decisions must be made before the individual even

knows if he will be charged and of what offense he will be accused.

To force persons to make this kind of choice between two fundamental rights places an intolerable burden on the exercise of those rights. "It cuts down on the privilege [of testifying in one's own defense] by making its assertion costly," *Griffin* v. *California*, *supra*, at 614, and is therefore forbidden.

II

I have explained why I believe the use for impeachment purposes of a defendant's prearrest failure to volunteer his version of events to the authorities is constitutionally impermissible. I disagree not only with the Court's holding in this case, but as well with its emerging conception of the individual's duty to assist the State in obtaining convictions, including his own—a conception which, I believe, is fundamentally at odds with our constitutional system. See, *e. g.*, *Roberts* v. *United States*, 445 U. S. 552, 569–572 (1980) (MARSHALL, J., dissenting). This conception disparages not only individual freedoms, but also the social interest in preserving those liberties and in the integrity of the criminal justice system. There is no doubt an important social interest in enabling police and prosecutors to obtain convictions. But the Court does not serve the Nation well by subordinating to that interest the safeguards that the Constitution guarantees to the criminal defendant.

AGINS ET UX. *v.* CITY OF TIBURON

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 79–602. Argued April 15, 1980—Decided June 10, 1980

After appellants had acquired five acres of unimproved land in appellee city for residential development, the city was required by California law to prepare a general plan governing land use and the development of open-space land. In response, the city adopted zoning ordinances that placed appellants' property in a zone in which property may be devoted to one-family dwellings, accessory buildings, and open-space uses, with density restrictions permitting appellants to build between one and five single-family residences on their tract. Without having sought approval for development of their tract under the ordinances, appellants brought suit against the city in state court, alleging that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments, and seeking, *inter alia*, a declaration that the zoning ordinances were facially unconstitutional. The city's demurrer claiming that the complaint failed to state a cause of action was sustained by the trial court, and the California Supreme Court affirmed.

Held: The zoning ordinances on their face do not take appellants' property without just compensation. Pp. 260–263.

(a) The ordinances substantially advance the legitimate governmental goal of discouraging premature and unnecessary conversion of open-space land to urban uses and are proper exercises of the city's police power to protect its residents from the ill effects of urbanization. Pp. 261–262.

(b) Appellants will share with other owners the benefits and burdens of the city's exercise of such police power, and in assessing the fairness of the ordinances these benefits must be considered along with any diminution in market value that appellants might suffer. P. 262.

(c) Although the ordinances limit development, they neither prevent the best use of appellants' land nor extinguish a fundamental attribute of ownership. Since at this juncture appellants are free to pursue their reasonable investment expectations by submitting a development plan to the city, it cannot be said that the impact of the ordinances has denied them the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. Pp. 262–263.

24 Cal. 3d 266, 598 P. 2d 25, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Gideon Kanner argued the cause for appellants. With him on the briefs were *John P. Pollock* and *Reginald G. Hearn.*

E. Clement Shute, Jr., argued the cause *pro hac vice* for appellee. With him on the brief were *Robert I. Conn* and *Gary T. Ragghianti.**

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*Briefs of *amici curiae* urging reversal were filed by *Robert A. Ferris* for the California Forest Protective Association; by *Les J. Weinstein* and *Aaron M. Peck* for the Glendale Federal Savings and Loan Association; by *Howard N. Ellman, Kenneth N. Burns,* and *Michael J. Burke* for Half Moon Bay Properties, Inc.; by *Gus Bauman* for the National Association of Home Builders et al.; by *Ronald A. Zumbrun* and *Thomas E. Hookano* for the Pacific Legal Foundation; and, *pro se,* by *Burton J. Goldstein, M. Reed Hunter, Jess S. Jackson, Jr., Jerrold A. Fadem, Michael M. Berger, Roger M. Sullivan, Richard F. Desmond, Stephen J. Wagner, Gerald B. Hansen,* and *Alfred P. Chasuk* for Mr. Goldstein et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Elinor Hadley Stillman,* and *Jacques B. Gelin* for the United States; by *George Deukmejian,* Attorney General, *N. Gregory Taylor,* Assistant Attorney General, and *Richard C. Jacobs,* Deputy Attorney General, for the State of California; by the Attorneys General and other officials of their respective jurisdictions as follows: *J. D. MacFarlane,* Attorney General of Colorado; *Richard S. Gebelein,* Attorney General of Delaware, and *Regina M. Small,* State Solicitor; *Jim Smith,* Attorney General of Florida, and *Richard Hixson,* Assistant Attorney General; *Wayne Minami,* Attorney General of Hawaii; *William J. Scott,* Attorney General of Illinois, and *George Wolff,* Assistant Attorney General; *William J. Guste, Jr.,* Attorney General of Louisiana, and *Kendall Vick,* Assistant Attorney General; *Richard S. Cohen,* Attorney General of Maine, and *Cabanne Howard,* Assistant Attorney General; *Stephen H. Sachs,* Attorney General of Maryland, and *Paul F. Strain* and *Thomas A. Deming,* Deputy Attorneys General; *Francis X. Bellotti,* Attorney General of Massachusetts, and *Stephen M. Leonard,* Assistant Attorney General; *Robert Abrams,* Attorney General of New York; *William J. Brown,* Attorney General of Ohio, and *Colleen Nissl,* Assistant Attorney General; *James A. Redden,* Attorney General of Oregon, and *Peter S. Herman* and *Mary J. Deits,* Deputy Attorneys General; *M. Jerome Diamond,* Attorney General of Vermont, and *Bensen D. Scotch,* Assistant Attorney General; *Slade Gorton,* Attorney General of Washington, and *Charles B. Roe, Jr.,* Senior

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether municipal zoning ordinances took appellants' property without just compensation in violation of the Fifth and Fourteenth Amendments.

I

After the appellants acquired five acres of unimproved land in the city of Tiburon, Cal., for residential development, the city was required by state law to prepare a general plan governing both land use and the development of open-space land. Cal. Govt. Code Ann. §§ 65302 (a) and (e) (West Supp. 1979); see § 65563. In response, the city adopted two ordinances that modified existing zoning requirements. Tiburon, Cal., Ordinances Nos. 123 N. S. and 124 N. S. (June 28, 1973). The zoning ordinances placed the appellants' property in "RPD–1," a Residential Planned Development and Open Space Zone. RPD–1 property may be devoted to one-family dwellings, accessory buildings, and open-space uses. Density restrictions permit the appellants to build between one and five single-family residences on their 5-acre tract. The appellants never have sought approval for development of their land under the zoning ordinances.[1]

Assistant Attorney General; and *Bronson C. La Follette*, Attorney General of Wisconsin, for the State of Colorado et al.; by *John H. Larson* and *Paul T. Hanson* for the County of Los Angeles; by *Robert J. Logan* and *Jeffrey P. Widman* for the City of San Jose et al.; by *Daniel Riesel, Nicholas A. Robinson, Joel H. Sachs, Ross Sandler*, and *Philip Weinberg* for the Committee on Environmental Law of the Association of the Bar of the City of New York; by *David Bonderman* for the Conservation Foundation et al.; and by *Elliott E. Blinderman* for the Federation of Hillside and Canyon Associations, Inc., et al.

Briefs of *amici curiae* were filed by *Timothy B. Flynn* and *A. Thomas Hunt* for the American Planning Association et al.; by *Frank Schnidman* for the National Association of Manufacturers; and by *Louis E. Goebel* and *Guenter S. Cohn* for San Diego Gas & Electric Co.

[1] Shortly after it enacted the ordinances, the city began eminent domain proceedings against the appellants' land. The following year, however, the

The appellants filed a two-part complaint against the city in State Superior Court. The first cause of action sought $2 million in damages for inverse condemnation.[2] The second cause of action requested a declaration that the zoning ordinances were facially unconstitutional. The gravamen of both claims was the appellants' assertion that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments. The complaint alleged that land in Tiburon has greater value than any other suburban property in the State of California. App. 3. The ridgelands that appellants own "possess magnificent views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands" in Tiburon. *Id.*, at 4. Rezoning of the land "forever prevented [its] development for residential use. . . ." *Id.*, at 5. Therefore, the appellants contended, the city had "completely destroyed the value of [appellants'] property for any purpose or use whatsoever. . . ." *Id.*, at 7.[3]

The city demurred, claiming that the complaint failed to state a cause of action. The Superior Court sustained the demurrer,[4] and the California Supreme Court affirmed. 24 Cal. 3d 266, 598 P. 2d 25 (1979). The State Supreme Court

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city abandoned those proceedings, and its complaint was dismissed. The appellants were reimbursed for costs incurred in connection with the action.

[2] Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. *United States* v. *Clarke*, 445 U. S. 253, 255–258 (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.*, at 257.

[3] The appellants also contended that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the land during the pendency of the condemnation proceedings. App. 10.

[4] The State Superior Court granted the appellants leave to amend the cause of action seeking a declaratory judgment, but the appellants did not avail themselves of that opportunity.

first considered the inverse condemnation claim. It held that a landowner who challenges the constitutionality of a zoning ordinance may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Id.*, at 273, 598 P. 2d, at 28. The sole remedies for such a taking, the court concluded, are mandamus and declaratory judgment. Turning therefore to the appellants' claim for declaratory relief, the California Supreme Court held that the zoning ordinances had not deprived the appellants of their property without compensation in violation of the Fifth Amendment.[5]

We noted probable jurisdiction. 444 U. S. 1011 (1980). We now affirm the holding that the zoning ordinances on their face do not take the appellants' property without just compensation.[6]

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[5] The California Supreme Court also rejected appellants' argument that the institution and abandonment of eminent domain proceedings themselves constituted a taking. The court found that the city had acted reasonably and that general municipal planning decisions do not violate the Fifth Amendment.

[6] The appellants also contend that the state courts erred by sustaining the demurrer despite their uncontroverted allegations that the zoning ordinances would "forever preven[t] . . . development for residential use," *id.*, at 5, and "completely destro[y] the value of [appellant's] property for any purpose or use whatsoever . . . ," *id.*, at 7. The California Supreme Court compared the express terms of the zoning ordinances with the factual allegations of the complaint. The terms of the ordinances permit construction of one to five residences on the appellants' 5-acre tract. The court therefore rejected the contention that the ordinances prevented all use of the land. Under California practice, allegations in a complaint are taken to be true unless "contrary to law or to a fact of which a court may take judicial notice." *Dale* v. *City of Mountain View*, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976); see *Martinez* v. *Socoma Cos.*, 11 Cal. 3d 394, 399–400, 521 P. 2d 841, 844 (1974). California courts may take judicial notice of municipal ordinances. Cal. Evid. Code Ann. § 452 (b) (West 1966). In this case, the State Supreme Court merely rejected allegations inconsistent with the explicit terms of the ordinance under

II

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." The appellants' complaint framed the question as whether a zoning ordinance that prohibits all development of their land effects a taking under the Fifth and Fourteenth Amendments. The California Supreme Court rejected the appellants' characterization of the issue by holding, as a matter of state law, that the terms of the challenged ordinances allow the appellants to construct between one and five residences on their property. The court did not consider whether the zoning ordinances would be unconstitutional if applied to prevent appellants from building five homes. Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions. See *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, 588 (1972). See also *Goldwater* v. *Carter*, 444 U. S. 996, 997 (1979) (POWELL, J., concurring). Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U. S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 138, n. 36 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule de-

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review. The appellants' objection to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court. See *Patterson* v. *Colorado ex rel. Attorney General*, 205 U. S. 454, 461 (1907).

termines when property has been taken, see *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), the question necessarily requires a weighing of private and public interests. The seminal decision in *Euclid* v. *Ambler Co.*, 272 U. S. 365 (1926), is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner. *Id.*, at 395–397.

In this case, the zoning ordinances substantially advance legitimate governmental goals. The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses." Cal. Govt. Code Ann. § 65561 (b) (West. Supp. 1979).[7] The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization.[8] Such governmental purposes long have been recognized as legitimate. See *Penn Central Transp. Co.* v. *New York City*, *supra*, at 129; *Village of Belle Terre* v.

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[7] The State also recognizes that the preservation of open space is necessary "for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources." Cal. Govt. Code Ann. § 65561 (a) (West. Supp. 1979); see Tiburon, Cal., Ordinance No. 124 N. S. §§ 1 (f) and (h).

[8] The City Council of Tiburon found that "[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Id.*, § 1 (c).

Boraas, 416 U. S. 1, 9 (1974); *Euclid* v. *Ambler Co., supra*, at 394–395.

The ordinances place appellants' land in a zone limited to single-family dwellings, accessory buildings, and open-space uses. Construction is not permitted until the builder submits a plan compatible with "adjoining patterns of development and open space." Tiburon, Cal., Ordinance No. 123 N. S. § 2 (F). In passing upon a plan, the city also will consider how well the proposed development would preserve the surrounding environment and whether the density of new construction will be offset by adjoining open spaces. *Ibid.* The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.

Although the ordinances limit development, they neither prevent the best use of appellants' land, see *United States* v. *Causby*, 328 U. S. 256, 262, and n. 7 (1946), nor extinguish a fundamental attribute of ownership, see *Kaiser Aetna* v. *United States, supra*, at 179–180. The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential. App. 3–4. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied

appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. See *Penn Central Transp. Co.* v. *New York City*, 438 U. S., at 124.[9]

III

The State Supreme Court determined that the appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation.

The judgment of the Supreme Court of California is

Affirmed.

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[9] Appellants also claim that the city's precondemnation activities constitute a taking. See nn. 1, 3, and 5, *supra*. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. See also *City of Walnut Creek* v. *Leadership Housing Systems, Inc.*, 73 Cal. App. 3d 611, 620–624, 140 Cal. Rptr. 690, 695–697 (1977). Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth* v. *United States*, 308 U. S. 271, 285 (1939). See *Thomas W. Garland, Inc.* v. *City of St. Louis*, 596 F. 2d 784, 787 (CA8), cert. denied, 444 U. S. 899 (1979); *Reservation Eleven Associates* v. *District of Columbia*, 136 U. S. App. D. C. 311, 315–316, 420 F. 2d 153, 157–158 (1969); *Virgin Islands* v. *50.05 Acres of Land*, 185 F. Supp. 495, 498 (V. I. 1960); 2 J. Sackman & P. Rohan, Nichols' Law of Eminent Domain § 6.13 [3] (3d ed. 1979).

UNITED STATES *v.* HENRY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79–121. Argued January 16, 1980—Decided June 16, 1980

After respondent was indicted for armed robbery of a bank, and while he was in jail pending trial, Government agents contacted an informant who was then an inmate confined in the same cellblock as respondent. An agent instructed the informant to be alert to any statements made by federal prisoners but not to initiate conversations with or question respondent regarding the charges against him. After the informant had been released from jail, he reported to the agent that he and respondent had engaged in conversation and that respondent made incriminating statements about the robbery. The informant was paid for furnishing the information. At respondent's trial, which resulted in a conviction, the informant testified about the incriminating statements that respondent had made to him. Respondent moved to vacate his sentence on the ground that the introduction of the informant's testimony interfered with and violated his Sixth Amendment right to the assistance of counsel. The District Court denied the motion, but the Court of Appeals reversed, holding that the Government's actions impaired respondent's Sixth Amendment rights under *Massiah* v. *United States*, 377 U. S. 201.

Held: Respondent's statements to the informant should not have been admitted at trial. By intentionally creating a situation likely to induce respondent to make incriminating statements without the assistance of counsel, the Government violated respondent's Sixth Amendment right to counsel. Under the facts—particularly the facts that the informant was acting under instructions as a paid informant for the Government while ostensibly no more than a fellow inmate, and that respondent was in custody and under indictment at the time—incriminating statements were "deliberately elicited" from respondent within the meaning of *Massiah*. Since respondent was unaware that the informant was acting for the Government, he cannot be held to have waived his right to the assistance of counsel. Pp. 269–275.

590 F. 2d 544, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 275. BLACKMUN, J., filed a dissenting

opinion, in which WHITE, J., joined, *post*, p. 277. REHNQUIST, J., filed a dissenting opinion, *post*, p. 289.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann,* and *Edwin S. Kneedler.*

Michael E. Geltner argued the cause for respondent. With him on the brief were *Larry J. Ritchie* and *William W. Greenhalgh.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by respondent to his cellmate, an undisclosed Government informant, after indictment and while in custody. 444 U. S. 824 (1979).

I

The Janaf Branch of the United Virginia Bank/Seaboard National in Norfolk, Va., was robbed in August 1972. Witnesses saw two men wearing masks and carrying guns enter the bank while a third man waited in the car. No witnesses were able to identify respondent Henry as one of the participants. About an hour after the robbery, the getaway car was discovered. Inside was found a rent receipt signed by one "Allen R. Norris" and a lease, also signed by Norris, for a house in Norfolk. Two men, who were subsequently convicted of participating in the robbery, were arrested at the rented house. Discovered with them were the proceeds of the robbery and the guns and masks used by the gunmen.

Government agents traced the rent receipt to Henry; on the basis of this information, Henry was arrested in Atlanta, Ga., in November 1972. Two weeks later he was indicted for

armed robbery under 18 U. S. C. §§ 2113 (a) and (d). He was held pending trial in the Norfolk city jail. Counsel was appointed on November 27.

On November 21, 1972, shortly after Henry was incarcerated, Government agents working on the Janaf robbery contacted one Nichols, an inmate at the Norfolk city jail, who for some time prior to this meeting had been engaged to provide confidential information to the Federal Bureau of Investigation as a paid informant. Nichols was then serving a sentence on local forgery charges. The record does not disclose whether the agent contacted Nichols specifically to acquire information about Henry or the Janaf robbery.[1]

Nichols informed the agent that he was housed in the same cellblock with several federal prisoners awaiting trial, including Henry. The agent told him to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery. In early December, after Nichols had been released from jail, the agent again contacted Nichols, who reported that he and Henry had engaged in conversation and that Henry had told him about the robbery of the Janaf bank.[2] Nichols was paid for furnishing the information.

When Henry was tried in March 1973, an agent of the

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[1] The record does disclose that on November 21, 1972, the same day the agent contacted Nichols, the agent's supervisor interrogated Henry at the jail. After denying participation in the robbery, Henry exercised his right to terminate the interview.

[2] Henry also asked Nichols if he would help him once Nichols was released. Henry requested Nichols to go to Virginia Beach and contact a woman there. He prepared instructions on how to find the woman and wanted Nichols to tell her to visit Henry in the Norfolk jail. He explained that he wanted to ask the woman to carry a message to his partner, who was incarcerated in the Portsmouth city jail. Henry also gave Nichols a telephone number and asked him to contact an individual named "Junior" or "Nail." In addition Henry asked Nichols to provide him with a floor plan of the United States Marshals' office and a handcuff key because Henry intended to attempt an escape.

Federal Bureau of Investigation testified concerning the events surrounding the discovery of the rental slip and the evidence uncovered at the rented house. Other witnesses also connected Henry to the rented house, including the rental agent who positively identified Henry as the "Allen R. Norris" who had rented the house and had taken the rental receipt described earlier. A neighbor testified that prior to the robbery she saw Henry at the rented house with John Luck, one of the two men who had by the time of Henry's trial been convicted for the robbery. In addition, palm prints found on the lease agreement matched those of Henry.

Nichols testified at trial that he had "an opportunity to have some conversations with Mr. Henry while he was in the jail," and that Henry told him that on several occasions he had gone to the Janaf Branch to see which employees opened the vault. Nichols also testified that Henry described to him the details of the robbery and stated that the only evidence connecting him to the robbery was the rental receipt. The jury was not informed that Nichols was a paid Government informant.

On the basis of this testimony,[3] Henry was convicted of bank robbery and sentenced to a term of imprisonment of 25 years. On appeal, he raised no Sixth Amendment claims. His conviction was affirmed, judgt. order reported at 483 F. 2d 1401 (CA4 1973), and his petition to this Court for a writ of certiorari was denied. 421 U. S. 915 (1975).

On August 28, 1975, Henry moved to vacate his sentence pursuant to 28 U. S. C. § 2255.[4] At this stage, he stated that

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[3] Joseph Sadler, another of Henry's cellmates, also testified at trial. He stated that Henry had told him that Henry had robbed a bank with a man named "Lucky" or "Luck." Sadler testified that on advice of counsel he informed Government agents of the conversation with Henry. Sadler was not a paid informant and had no arrangement to monitor or report on conversations with Henry.

[4] In his § 2255 petition, Henry also alleged that Sadler's testimony was perjurious; that the Government failed to disclose *Brady* material, see

he had just learned that Nichols was a paid Government informant and alleged that he had been intentionally placed in the same cell with Nichols so that Nichols could secure information about the robbery. Thus, Henry contended that the introduction of Nichols' testimony violated his Sixth Amendment right to the assistance of counsel. The District Court denied the motion without a hearing. The Court of Appeals, however, reversed and remanded for an evidentiary inquiry into "whether the witness [Nichols] was acting as a government agent during his interviews with Henry."

On remand, the District Court requested affidavits from the Government agents. An affidavit was submitted describing the agent's relationship with Nichols and relating the following conversation:

> "I recall telling Nichols at this time to be alert to any statements made by these individuals [the federal prisoners] regarding the charges against them. I specifically recall telling Nichols that he was not to question Henry or these individuals about the charges against them, however, if they engaged him in conversation or talked in front of him, he was requested to pay attention to their statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay attention to the information furnished by Henry."

The agent's affidavit also stated that he never requested anyone affiliated with the Norfolk city jail to place Nichols in the same cell with Henry.

The District Court again denied Henry's § 2255 motion, concluding that Nichols' testimony at trial did not violate Henry's

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Brady v. *Maryland*, 373 U. S. 83 (1963); that the United States Attorney's argument to the jury was impermissibly prejudicial; and that his trial counsel was incompetent. The District Court rejected each of these grounds, and none of these issues is before this Court.

Sixth Amendment right to counsel. The Court of Appeals reversed and remanded, holding that the actions of the Government impaired the Sixth Amendment rights of the defendant under *Massiah* v. *United States*, 377 U. S. 201 (1964). The court noted that Nichols had engaged in conversation with Henry and concluded that if by association, by general conversation, or both, Nichols had developed a relationship of trust and confidence with Henry such that Henry revealed incriminating information, this constituted interference with the right to the assistance of counsel under the Sixth Amendment.[5] 590 F. 2d 544 (1978).

II

This Court has scrutinized postindictment confrontations between Government agents and the accused to determine whether they are "critical stages" of the prosecution at which the Sixth Amendment right to the assistance of counsel attaches. See, *e. g.*, *United States* v. *Ash*, 413 U. S. 300 (1973); *United States* v. *Wade*, 388 U. S. 218 (1967). The present case involves incriminating statements made by the accused to an undisclosed and undercover Government informant while in custody and after indictment. The Government characterizes Henry's incriminating statements as voluntary and not the result of any affirmative conduct on the part of Government agents to elicit evidence. From this, the Government argues that Henry's rights were not violated, even assuming the Sixth Amendment applies to such surreptitious confrontations; in short, it is contended that the Government has not interfered with Henry's right to counsel.[6]

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[5] The Court of Appeals acknowledged that the testimony of Sadler, another cellmate of Henry, supported the conviction but was not willing to conclude beyond a reasonable doubt that Nichols' testimony did not influence the jury. *Chapman* v. *California*, 386 U. S. 18, 24 (1967).

[6] Although both the Government, and MR. JUSTICE REHNQUIST in dissent, question the continuing vitality of the *Massiah* branch of the Sixth Amendment, we reject their invitation to reconsider it.

This Court first applied the Sixth Amendment to postindictment communications between the accused and agents of the Government in *Massiah* v. *United States, supra.* There, after the accused had been charged, he made incriminating statements to his codefendant, who was acting as an agent of the Government. In reversing the conviction, the Court held that the accused was denied "the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicted from him." *Id.*, at 206. The *Massiah* holding rests squarely on interference with his right to counsel.

The question here is whether under the facts of this case a Government agent "deliberately elicited" incriminating statements from Henry within the meaning of *Massiah.* Three factors are important. First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

The Court of Appeals viewed the record as showing that Nichols deliberately used his position to secure incriminating information from Henry when counsel was not present and held that conduct attributable to the Government. Nichols had been a paid Government informant for more than a year; moreover, the FBI agent was aware that Nichols had access to Henry and would be able to engage him in conversations without arousing Henry's suspicion. The arrangement between Nichols and the agent was on a contingent-fee basis; Nichols was to be paid only if he produced useful information.[7]

[7] The affidavit of the agent discloses that "Nichols had been paid by the FBI for expenses and services in connection with information he had provided" as an informant for at least a year. The only reasonable inference from this statement is that Nichols was paid when he produced information, not that Nichols was continuously on the payroll of the FBI. Here, the service requested of Nichols was that he obtain incriminating

This combination of circumstances is sufficient to support the Court of Appeals' determination. Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result.

The Government argues that the federal agents instructed Nichols not to question Henry about the robbery.[8] Yet according to his own testimony, Nichols was not a passive listener; rather, he had "some conversations with Mr. Henry" while he was in jail and Henry's incriminatory statements were "the product of this conversation." While affirmative interrogation, absent waiver, would certainly satisfy *Massiah*, we are not persuaded, as the Government contends, that *Brewer* v. *Williams*, 430 U. S. 387 (1977), modified *Massiah*'s "deliberately elicited" test. See *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980).[9] In *Massiah*, no inquiry was

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information from Henry; there is no indication that Nichols would have been paid if he had not performed the requested service.

[8] Two aspects of the agent's affidavit are particularly significant. First, it is clear that the agent in his discussions with Nichols singled out Henry as the inmate in whom the agent had a special interest. Thus, the affidavit relates that "I specifically recall telling Nichols that he was not to question *Henry* or these individuals" and "I recall telling Nichols not to initiate any conversations *with Henry* regarding the bank robbery charges," but to "pay attention to the information furnished *by Henry*." (Emphasis added.) Second, the agent only instructed Nichols not to question Henry or to initiate conversations regarding the bank robbery charges. Under these instructions, Nichols remained free to discharge his task of eliciting the statements in myriad less direct ways.

[9] The situation where the "listening post" is an inanimate electronic device differs; such a device has no capability of leading the conversation into any particular subject or prompting any particular replies. See, *e. g.*, *United States* v. *Hearst*, 563 F. 2d 1331, 1347–1348 (CA9 1977), cert. denied, 435 U. S. 1000 (1978). However, that situation is not presented in this case, and there is no occasion to treat it; nor are we called upon to pass on the situation where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged.

made as to whether Massiah or his codefendant first raised the subject of the crime under investigation.[10]

It is quite a different matter when the Government uses undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity prior to the time charges are filed. In *Hoffa* v. *United States*, 385 U. S. 293, 302 (1966), for example, this Court held that "no interest legitimately protected by the Fourth Amendment is involved" because "the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." See also *United States* v. *White*, 401 U. S. 745 (1971). Similarly, the Fifth Amendment has been held not to be implicated by the use of undercover Government agents before charges are filed because of the absence of the potential for compulsion. See *Hoffa* v. *United States*, *supra*, at 303–304. But the Fourth and Fifth Amendment claims made in those cases are not relevant to the inquiry under the Sixth Amendment here—whether the Government has interfered with the right to counsel of the accused by "deliberately eliciting" incriminating statements. Our holding today does not modify *White* or *Hoffa*.

It is undisputed that Henry was unaware of Nichols' role as a Government informant. The Government argues that this Court should apply a less rigorous standard under the

[10] No doubt the role of the agent at the time of the conversations between Massiah and his codefendant was more active than that of the federal agents here. Yet the additional fact in *Massiah* that the agent was monitoring the conversations is hardly determinative. In both *Massiah* and this case, the informant was charged with the task of obtaining information from an accused. Whether Massiah's codefendant questioned Massiah about the crime or merely engaged in general conversation about it was a matter of no concern to the *Massiah* Court. Moreover, we deem it irrelevant that in *Massiah* the agent had to arrange the meeting between Massiah and his codefendant while here the agents were fortunate enough to have an undercover informant already in close proximity to the accused.

Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers. That line of argument, however, seeks to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel. An accused speaking to a known Government agent is typically aware that his statements may be used against him. The adversary positions at that stage are well established; the parties are then "arm's-length" adversaries.

When the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent, the same cannot be said. Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents. Indeed, the *Massiah* Court noted that if the Sixth Amendment "is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." The Court pointedly observed that Massiah was more seriously imposed upon because he did not know that his codefendant was a Government agent. 377 U. S., at 206.

Moreover, the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government. See *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). In that setting, Henry, being unaware that Nichols was a Government agent expressly commissioned to secure evidence, cannot be held to have waived his right to the assistance of counsel.

Finally, Henry's incarceration at the time he was engaged in conversation by Nichols is also a relevant factor.[11] As a ground

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[11] This is not to read a "custody" requirement, which is a prerequisite to the attachment of *Miranda* rights, into this branch of the Sixth Amend-

for imposing the prophylactic requirements in *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966), this Court noted the powerful psychological inducements to reach for aid when a person is in confinement. See also *id.*, at 448–454. While the concern in *Miranda* was limited to custodial police interrogation, the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents. The Court of Appeals determined that on this record the incriminating conversations between Henry and Nichols were facilitated by Nichols' conduct and apparent status as a person sharing a common plight. That Nichols had managed to gain the confidence of Henry, as the Court of Appeals determined, is confirmed by Henry's request that Nichols assist him in his escape plans when Nichols was released from confinement.[12]

Under the strictures of the Court's holdings on the exclusion of evidence, we conclude that the Court of Appeals did not err in holding that Henry's statements to Nichols should not have been admitted at trial. By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel.[13] This is

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ment. Massiah was in no sense in custody at the time of his conversation with his codefendant. Rather, we believe the fact of custody bears on whether the Government "deliberately elicited" the incriminating statements from Henry.

[12] This is admittedly not a case such as *Massiah* where the informant and the accused had a prior longstanding relationship. Nevertheless, there is ample evidence in the record which discloses that Nichols had managed to become more than a casual jailhouse acquaintance. That Henry could be induced to discuss his past crime is hardly surprising in view of the fact that Nichols had so ingratiated himself that Henry actively solicited his aid in executing his next crime—his planned attempt to escape from the jail.

[13] The holding of the Court of Appeals that this was not harmless error is on less firm grounds in view of the strong evidence against Henry, in-

not a case where, in Justice Cardozo's words, "the constable . . . blundered," *People* v. *DeFore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926); rather, it is one where the "constable" planned an impermissible interference with the right to the assistance of counsel.[14]

The judgment of the Court of Appeals for the Fourth Circuit is

Affirmed.

MR. JUSTICE POWELL, concurring.

The question in this case is whether the Government deliberately elicited information from respondent in violation of the rule of *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Brewer* v. *Williams*, 430 U. S. 387 (1977). I join the opinion of the Court, but write separately to state my understanding of the Court's holding.

I

In *Massiah* v. *United States*, this Court held that the Government violated the Sixth Amendment when it deliberately elicited incriminating information from an indicted defendant who was entitled to assistance of counsel. 377 U. S., at

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cluding the testimony of a neutral fellow inmate, Henry's rental of the hideaway house, and his presence there with the other participants in the robbery before the crime. The Government, however, has not argued that the error was harmless, and on balance, we are not inclined to disturb the determination of the Court of Appeals.

[14] Although it does not bear on the constitutional question in this case, we note that Disciplinary Rule 7–104 (A)(1) of the Code of Professional Responsibility provides:

"(A) During the course of his representation of a client a lawyer shall not:

"(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

See also Ethical Consideration 7–18.

206. Government agents outfitted an informant's automobile with radio transmitting equipment and instructed the informant to engage the defendant in conversation relating to the crimes. *United States* v. *Massiah*, 307 F. 2d 62, 72 (CA2 1962) (Hays, J., dissenting). In suppressing statements overheard during the resulting conversation, the Court emphasized that the Sixth Amendment must " 'apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. . . .' " 377 U. S., at 206, quoting 307 F. 2d, at 72 (Hays, J., dissenting). Similarly, in *Brewer* v. *Williams*, *supra*, we applied *Massiah* to a situation in which a police detective purposefully isolated a suspect from his lawyers and, during a long ride in a police car, elicited incriminating remarks from the defendant through skillful interrogation. We suppressed the statement because the government "deliberately and designedly set out to elicit" information from a suspect. 430 U. S., at 399; see *id.*, at 407 (MARSHALL, J., concurring); *id.*, at 412 (POWELL, J., concurring).

The rule of *Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated. But *Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action. Thus, the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments. See *United States* v. *Hearst*, 563 F. 2d 1331, 1347–1348 (CA9 1977), cert. denied, 435 U. S. 1000 (1978). Similarly, the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional. In such a case, the question would be whether the informant's actions constituted deliberate and "surreptitious interrogatio[n]" of the defendant. If they did not, then there would be no interference with the relationship between client and counsel.

II

I view this as a close and difficult case on its facts because no evidentiary hearing has been held on the *Massiah* claim. Normally, such a hearing is helpful to a reviewing court and should be conducted. On balance, however, I accept the view of the Court of Appeals and of the Court that the record adequately demonstrates the existence of a *Massiah* violation. I could not join the Court's opinion if it held that the mere presence or incidental conversation of an informant in a jail cell would violate *Massiah*.* To demonstrate an infringement of the Sixth Amendment, a defendant must show that the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation. See *Brewer* v. *Williams*, 430 U. S., at 399; *id.*, at 411, 412 (POWELL, J., concurring). See also *Rhode Island* v. *Innis*, 446 U. S. 291 (1980).

Because I understand that the decision today rests on a conclusion that this informant deliberately elicited incriminating information by such conduct, I join the opinion of the Court.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE joins, dissenting.

In this case the Court, I fear, cuts loose from the moorings of *Massiah* v. *United States*, 377 U. S. 201 (1964),[1] and overlooks or misapplies significant facts to reach a result that is not required by the Sixth Amendment, by established precedent, or by sound policy.

The Court of Appeals resolved this case by a divided vote, with all three judges writing separately. Three of the seven

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*By reserving the question whether the mere presence of an informant in a jail cell violates *Massiah*, the Court demonstrates that its holding is not premised upon such a theory. *Ante*, at 269, n. 6.

[1] For purposes of this case, I see no need to abandon *Massiah* v. *United States*, as MR. JUSTICE REHNQUIST does.

judges then on that court dissented from the denial of rehearing en banc. And MR. JUSTICE POWELL, in his separate concurring opinion, obviously is less than comfortable, finds the case "close and difficult," *ante*, at 277, and writes to assure that his concurring vote preserves his contrary posture when the Court will be confronted with only "the mere presence or incidental conversation of an informant in a jail cell." *Ibid.* This division of opinion about this case attests to the importance of correct factual analysis here.

Because I view the principles of *Massiah* and the facts of this case differently than the Court does, I dissent.

I

Massiah mandates exclusion only if a federal agent "deliberately elicited" statements from the accused in the absence of counsel. 377 U. S., at 206. The word "deliberately" denotes intent. *Massiah* ties this intent to the act of elicitation, that is, to conduct that draws forth a response. Thus *Massiah*, by its own terms, covers only action undertaken with the specific intent to evoke an inculpatory disclosure.

Faced with Agent Coughlin's unequivocal expression of an intent *not* to elicit statements from respondent Henry, but merely passively to receive them, *ante*, at 268; App. to Pet. for Cert. 58a, the Court, in its decision to affirm the judgment of the Court of Appeals, has no choice but to depart from the natural meaning of the *Massiah* formulation. The Court deems it critical that informant Nichols had been a paid informant; that Agent Coughlin was aware that Nichols "had access" to Henry and "would be able to engage him in conversations without arousing Henry's suspicion"; and that payment to Nichols was on a contingent-fee basis. *Ante*, at 270. Thus, it is said, even if Coughlin's "statement is accepted . . . he must have known that such propinquity likely would lead to that result" (that is, that Nichols would take "affirmative steps to secure incriminating information"). *Ante*, at 271. Later, the Court goes even further, characterizing this as a

case of "intentionally creating a situation *likely to induce* Henry to make incriminating statements." *Ante*, at 274. (Emphasis added.) This determination, coupled with the statement that Nichols "prompted" respondent Henry's remarks, *ante*, at 273, and see *ante*, at 271, n. 9, leads the Court to find a *Massiah* violation.

Thus, while claiming to retain the "deliberately elicited" test, the Court really forges a new test that saps the word "deliberately" of all significance. The Court's extension of *Massiah* would cover even a "negligent" triggering of events resulting in reception of disclosures. This approach, in my view, is unsupported and unwise.

A. *Authority.* The Court's precedents appear to me to be contrary to this new objective approach. *Spano* v. *New York*, 360 U. S. 315 (1959), whose concurring opinions presaged *Massiah*, see 377 U. S., at 204, concerned an "all-night inquisition" during which the defendant "repeatedly asked to be allowed to send for his lawyer." 360 U. S., at 327 (concurring opinion). Obviously, that case involved deliberate efforts to extract information in the absence of counsel. In *Massiah* itself, the agent engineered a pretrial meeting between the accused and a turncoat codefendant. The agent instructed the latter to talk to the defendant about the crime, see *United States* v. *Massiah*, 307 F. 2d 62, 66 (CA2 1962); *id.*, at 72 (dissenting opinion), and he bugged the meeting place so he could listen in.[2] *United States* v. *Ash*, 413 U. S. 300 (1973), by emphasizing that *Massiah* involved a "ruse" and that *Massiah*'s purpose was to neutralize "the overreaching of the prosecution," *id.*, at 312, reinforced the view that deliberate elicitation entails purposeful police action.

If any question could possibly have remained about the subjective nature of the *Massiah* inquiry, it was dispelled by

[2] The planted bug, of course, not only underscored the agent's deliberate design to obtain incriminating information. By permitting the agent to monitor whether the codefendant informant abided by his agreement, it all but ensured that affirmative elicitation in fact would occur.

Brewer v. *Williams*, 430 U. S. 387 (1977). There the Court closely examined testimony regarding the agent's intentions. In the face of vigorous dissents, it found a Sixth Amendment violation only because "[t]here can be no serious doubt . . . that Detective Leaming *deliberately and designedly* set out to elicit information from Williams," and because in giving his "Christian burial speech," Leaming "purposely sought . . . to obtain as much incriminating information as possible." *Id.*, at 399 (emphasis added). See also *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980) (reaffirming the "deliberately elicited" criterion); Kamisar, *Brewer v. Williams, Massiah*, and *Miranda*: What is "Interrogation"? When Does it Matter?, 67 Geo. L. J. 1, 42 (1978) ("The use of the term 'deliberately elicited' seems to be quite intentional").[3]

The unifying theme of *Massiah* cases, then, is the presence of deliberate, designed, and purposeful tactics, that is, the agent's use of an investigatory tool with the specific intent of extracting information in the absence of counsel. Thus, the Court's "likely to induce" test fundamentally restructures *Massiah*. Even if the agent engages in no "overreaching," and believes his actions to be wholly innocent and passive, evidence he comes by must be excluded if a court, with the convenient benefit of 20/20 hindsight, finds it likely that the agent's actions would induce the statements.

B. *Policy*. For several reasons, I believe that the Court's revamping of *Massiah* abrogates sound judicial policy. First, its test will significantly broaden Sixth Amendment exclusion; yet, as THE CHIEF JUSTICE has stressed before, the "high price society pays for such a drastic remedy" as exclusion of indisputably reliable evidence in criminal trials cannot be denied. See, *e. g.*, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 413 (1971) (dissenting opinion). Second, I think the Court's approach fails to appre-

[3] It is noteworthy that the phrase "deliberately elicited" appears at least three times in the *Massiah* opinion. See 377 U. S., at 204, 206.

ciate fully and to accommodate adequately the "value" and the "unfortunate necessity of undercover work." *Weatherford* v. *Bursey*, 429 U. S. 545, 557 (1977). Third, I find it significant that the proffered statements are unquestionably voluntary. See *United States* v. *Washington*, 431 U. S. 181, 187 (1977) ("Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable"). Fourth, the Court condemns and punishes police conduct that I do not find culpable. See *Wilson* v. *Henderson*, 584 F. 2d 1185, 1191 (CA2 1978), cert. denied, 442 U. S. 945 (1979) (investigating officer's "directions, 'Don't ask questions, just keep your ears open,' suggest familiarity and attempted compliance with, not circumvention of, the principle of *Massiah*"). Fifth, at least absent an active, orchestrated ruse, I have great difficulty perceiving how canons of fairness are violated when the Government uses statements flowing from a "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa* v. *United States*, 385 U. S. 293, 302 (1966).[4]

Finally, I note the limits, placed in other Sixth Amendment cases, of providing counsel to counterbalance prosecutorial expertise and to aid defendants faced with complex and unfamiliar proceedings. See MR. JUSTICE REHNQUIST's dissenting opinion, *post*, at 290–298.[5] While not out of line with the

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[4] The Court's "likely to induce" analysis might also be subjected to the following criticism:

"Few, if any, police officers are competent to make the kind of evaluation seemingly contemplated; even a psychiatrist asked to express an expert opinion on these aspects of a suspect in custody would very likely employ extensive questioning and observation to make the judgment now charged to police officers." *Rhode Island* v. *Innis*, 446 U. S. 291, 304 (1980) (opinion concurring in judgment).

[5] MR. JUSTICE POWELL observes, *ante*, at 276, that "*Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been

Court's prior right-to-counsel cases, *Massiah* certainly is the decision in which Sixth Amendment protections have been extended to their outermost point. I simply do not perceive any good reason to give *Massiah* the expansion it receives in this case.[6]

II

In my view, the Court not only missteps in forging a new *Massiah* test; it proceeds to misapply the very test it has created. The new test requires a showing that the agent cre-

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initiated." I fail to see any greater "interference" on the facts of this case than in a case where an inmate is permitted to have a conversation with a trusted visitor, but with an electronic listening device in place, a practice MR. JUSTICE POWELL finds unobjectionable. *Ibid.* Indeed, bugging might be said to present an even stronger case for finding "deliberate elicitation." There is, after all, a likelihood that the inmate will place added confidence in a relative or longtime friend who visits him. Nichols, in contrast, had not known Henry previously. Moreover, with bugging, a defendant cannot know what he is dealing with. He lacks the ability intelligently to gauge the probability that his confidences will be "reported" back to government agents. See *Wilson* v. *Henderson*, 584 F. 2d 1185, 1191 (CA2 1978), cert. denied, 442 U. S. 945 (1979).

[6] Rejection of an objective test in this context is not inconsistent with *Rhode Island* v. *Innis*, *supra*, since "the policies underlying the two constitutional protections [Fifth and Sixth Amendments] are quite distinct." 446 U. S., at 300, n. 4. *Miranda*'s "prophylactic rule," see *Michigan* v. *Payne*, 412 U. S. 47, 53 (1973), seeks to protect a suspect's privilege against self-incrimination from "the compulsion inherent in custodial surroundings" when "interrogation" occurs. *Miranda* v. *Arizona*, 384 U. S. 436, 458 (1966). Thus, in *Miranda* cases, the degree of compulsion is critical. Beyond an objectively defined "pressure point," statements will be deemed presumedly compelled and therefore properly excluded, absent the countercoercive effect of *Miranda* warnings. See *id.*, at 467. *Massiah*, in contrast to *Miranda*, is not rooted in the Fifth Amendment privilege against self-incrimination. Rather, it is expressly designed to counter "deliberat[e]" interference with an indicted suspect's right to counsel. By focusing on deliberateness, *Massiah* imposes the exclusionary sanction on that conduct that is most culpable, most likely to frustrate the purpose of having counsel, and most susceptible to being checked by a deterrent. Cf. *Brown* v. *Illinois*, 422 U. S. 590, 604 (1975).

ated a situation "likely to induce" the production of incriminatory remarks, and that the informant in fact "prompted" the defendant. Even accepting the most capacious reading of both this language and the facts, I believe that neither prong of the Court's test is satisfied.

A. *"Likely to Induce."* In holding that Coughlin's actions were likely to induce Henry's statements, the Court relies on three facts: a contingent-fee arrangement; Henry's assumption that Nichols was just a cellmate; and Henry's incarceration.[7]

The Court states: "The arrangement between Nichols and the agent was on a contingent-fee basis; Nichols was to be paid only if he produced useful information." *Ante*, at 270. The District Court, however, made no such finding, and I am unconvinced that the evidence of record establishes such an understanding.[8] In any event, I question whether the existence of a contingent-fee arrangement is at all significant. The reasonable conclusion of an informant like Nichols would be that, whatever the arrangement, he would *not* be remu-

[7] The Court also notes that Henry, being located in the same cellblock as Nichols, was accessible to the informant. It nonetheless totally ignores the fact that the investigating agent had nothing to do with placing Henry and Nichols in the same cellblock. Indeed, the record shows that Coughlin did not confer with Nichols initially with the purpose of obtaining evidence about Henry; rather, the agent's affidavit indicates that he was unaware that Nichols and Henry were in the same cellblock until Nichols informed him. App. to Pet. for Cert. 57a–58a.

[8] The record shows that Nichols "had been paid by the FBI for expenses and services in connection with information he had provided on . . . previous occasions," *id.*, at 57a, and that "Nichols was paid by the FBI for expenses and services in connection with the [investigation] of Henry." *Id.*, at 59a. These facts establish at most an amorphous course of dealing, emanating from an unspecified number of previous investigations. They do not show that Nichols previously was paid only when he produced information. There can be no assurance that Nichols would *not* have been paid had he failed to come up with evidence implicating Henry or other federal defendants. Nor is there anything to indicate that Nichols acted on this assumption.

nerated if he breached his promise; yet the Court asks us to infer that Coughlin's conversation with Nichols "likely would lead" Nichols to engage in the very conduct which Coughlin told him to avoid. *Ante*, at 271.

The Court also emphasizes that Henry was "unaware that Nichols was a Government agent." *Ante*, at 273. One might properly assign this factor some importance, were it not for *Brewer* v. *Williams*. In that case, the Court explicitly held that the fact "[t]hat the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is *constitutionally irrelevant*." 430 U. S , at 400. (Emphasis added.) The Court's teeter-tottering with this factor in *Massiah* analysis can only induce confusion.

It merits emphasis that the Court's resurrection of the unawareness factor is indispensable to its holding. For, in *Brewer*, substantial contact and conversation with a confined defendant preceded delivery of the "Christian burial speech." Yet the Court clearly deemed the speech critical in finding a *Massiah* violation; it thus made clear that mere "association" and "general conversation" did not suffice to bring *Massiah* into play. Since nothing more transpired here, principled application of *Brewer* mandates reversal of the judgment in this case.

Finally, the Court notes that Henry was incarcerated when he made his statements to Nichols. The Court's emphasis of the "subtle influences" exerted by custody, however, is itself too subtle for me. This is not a case of a custodial encounter with police, in which the Government's display of power might overcome the free will of the accused. The relationship here was "social" and relaxed. Henry did not suspect that Nichols was connected with the FBI. Moreover, even assuming that "subtle influences" might encourage a detainee to talk about his crime, there are certainly counterbalances of at least equal weight. Since, in jail, "official surveillance has traditionally been the order of the day,"

Lanza v. *New York*, 370 U. S. 139, 143 (1962), and a jailmate has obvious incentives to assist authorities, one may expect a detainee to act with corresponding circumspection. Cf. *Rhode Island* v. *Innis*, 446 U. S., at 300, n. 4 ("Custody in . . . a [*Massiah*] case is not controlling; indeed, the petitioner in *Massiah* was not in custody").

The Court does more than rely on dubious factors in finding that Coughlin's actions were "likely to induce" Nichols' successful prompting of Henry; it fails to focus on facts that cut strongly against that conclusion. The Court ignores Coughlin's specific instruction to Nichols that he was not to question Henry or to initiate conversation with him about the robbery. Nor does it note Nichols' likely assumption that he would not be remunerated, but reprimanded and possibly penalized, if he violated Coughlin's orders. In addition, the record shows that Nichols had worked as an FBI informant for four years and that Coughlin and Nichols had worked together for about a year on several matters. It makes sense, given Nichols' experience and Coughlin's willingness to renew their working relationship, to conclude that Nichols would follow Coughlin's instruction. Finally, it is worth noting that Henry was only one of several federal detainees to whom Nichols was to pay attention; [9] this is not a case in

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[9] The Court's suggestion to the contrary, see *ante*, at 271, n. 8, based on three isolated segments of Coughlin's affidavit, exemplifies its treatment of the record. The relevant portion of Coughlin's affidavit reads in full:

"Nichols advised that he was in the same cellblock as Billy Gale Henry as well as with *other prisoners* who had Federal charges against *them*. I recall telling Nichols at this time to be alert to any statements made by *these individuals* regarding the charges against *them*. I specifically recall telling Nichols that he was not to question Henry or *these individuals* about the charges against *them*, however, if *they* engaged him in conversation or talked in front of him, he was requested to pay attention to *their* statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay

which officers singled out a specific target. On these facts, I cannot agree that Coughlin "must have known that [it was] likely" that Nichols would seek to elicit information from Henry.

Under the Court's analysis, it is not enough that Coughlin should have anticipated disobedience by Nichols; it must also be shown that his actions were "likely to induce" Henry to talk. In my view, however, there was little reason to believe that even the most aggressive efforts by Nichols would lead to disclosures by Henry. Nothing in the record suggests that Henry and Nichols knew each other, far less that they had the type of relationship that would lead Henry to discuss freely a crime for which he had not yet been tried. In this respect, the case stands in stark contrast to *Massiah*, where the informant had collaborated with Massiah in a drug smuggling operation and was a codefendant in the resulting and pending prosecution. Moreover, "[t]here is nothing in the record to suggest that . . . the [defendant] was peculiarly susceptible [to approaches by cellmates or that he] . . . was unusually disoriented or upset." *Rhode Island* v. *Innis*, 446 U. S., at 302–303. On these facts, it seems to me extremely *un*likely that Coughlin's actions would lead to Henry's statements.

Even though the test forged by the Court has no precedent, we are not without some assistance in judging its application. Just a few weeks ago, in *Rhode Island* v. *Innis*, the Court held that *Miranda* was implicated only by "words or actions on the part of police officers that they should have known were *reasonably likely* to elicit an incriminating response."

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attention to the information furnished by Henry." App. to Pet. for Cert. 58a (emphases added).

Since the affidavit containing this statement was submitted in Henry's case, it is neither surprising nor significant that it occasionally refers to Henry by name, while not referring specifically to remarks Coughlin might have made about other detainees. The Court's reading of this passage as establishing that "the agent . . . singled out Henry as the inmate in whom the agent had a special interest" seems to me extraordinary.

446 U. S., at 302 (emphasis deleted and added). Here, the Court asks whether agents "creat[ed] a situation likely to induce Henry to make incriminating statements." *Ante*, at 274. Although the Court in *Innis* emphasized that the *Massiah* and *Miranda* rules are distinct, 446 U. S., at 300, n. 4, I have some difficulty in identifying a material difference between these formulations. Since the Court found its test not satisfied in *Innis*, it should follow that Henry's statements may be excluded only if there was greater reason in this case than in *Innis* to expect incriminatory disclosures. The case for finding that disclosures were "likely," however, was clearly stronger in *Innis*. There the defendant had just been arrested at 4:30 a. m.; he was handcuffed and confined in a "caged wagon"; and the three police officers accompanying him triggered his confession by conversing about the danger that a "little girl" attending a nearby school for the handicapped would "maybe kill herself" upon finding a gun he supposedly had hidden. *Id.*, at 293–295. Against the backdrop of *Innis*, I cannot fathom how the Court can conclude that Coughlin's actions rendered Henry's disclosures "likely."

B. *"Prompting."* All Members of the Court agree that Henry's statements were properly admitted if Nichols did not "prompt" him. *Ante*, at 273, and see *ante*, at 271, n. 9; *ante*, at 276 (concurring opinion); *post*, at 302 (dissenting opinion). The record, however, gives no indication that Nichols "stimulated" Henry's remarks, *ante*, at 273, with "affirmative steps to secure incriminating information." *Ante*, at 271. Certainly the known facts reveal nothing more than "a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations." *Ante*, at 276 (concurring opinion).[10] The scant record demonstrates only that Nichols "had 'an opportunity to have some

[10] Indeed, here, unlike the scenario sketched by MR. JUSTICE POWELL, there was no instruction "to engage . . . in some conversations." It would seem that, *a fortiori*, Henry's statements should not be excluded.

conversations with Mr. Henry while he was in the jail.'" *Ante*, at 267. "Henry had engaged [Nichols] in conversation," "had requested Nichols' assistance," and "had talked to Nichols about the bank robbery charges against him." App. to Pet. for Cert. 58a. Thus, we know only that Nichols and Henry had conversations, hardly a startling development, given their location in the same cellblock in a city jail. We know nothing about the nature of these conversations, particularly whether Nichols subtly or otherwise focused attention on the bank robberies. Indeed, to the extent the record says anything at all, it supports the inference that it was Henry, not Nichols, who "engaged" the other "in some conversations," and who was the moving force behind any mention of the crime. I cannot believe that *Massiah* requires exclusion when a cellmate previously unknown to the defendant and asked only to keep his ears open says: "It's a nice day," and the defendant responds: "It would be nicer if I hadn't robbed that bank." The Court of Appeals, however, found it necessary to swallow that bitter pill in order to decide this case the way it did, and this Court does not show that anything more transpired.

Conceivably, the amount of information purveyed by Henry to Nichols could support an inference that some fishing for detail occurred. The Court does not invoke this reasoning, however, and even if the record is stretched to produce such a finding, it clearly discloses nothing about the *timing* of Henry's disclosures. It may well be that Henry first "let the cat out of the bag," either by volunteering statements or by inadvertently discussing the crime with someone else within earshot of Nichols. These possibilities are not farfetched. In addition to revealing Coughlin's instructions, which we may infer were followed, the record specifically indicates that Henry "volunteered" information about the robbery to a cellmate other than Nichols. App. 85. Moreover, the record discloses Henry's eagerness to make contact with a potential collaborator outside the jail; Nichols, who was soon

to be released, was a logical choice to serve as a go-between. The Court, however, seems unconcerned that some of Henry's statements were "spontaneously given." 590 F. 2d 544, 549 (CA4 1978) (dissenting opinion). It emphasizes that "[i]n *Massiah*, no inquiry was made as to whether Massiah or his codefendant first raised the subject of the crime under investigation." *Ante*, at 271–272. This observation trivializes the central facts of *Massiah*, in which an agent arranged a bugged meeting between codefendants who shared a natural interest in their pending prosecution, and in which the informant was instructed to, and did, converse about the pair's misdeeds.

III

In sum, I think this is an unfortunate decision, which disregards precedent and stretches to the breaking point a virtually silent record. Whatever the bounds of *Massiah*, that case does not justify exclusion of the proof challenged here.

MR. JUSTICE REHNQUIST, dissenting.

The Court today concludes that the Government through the use of an informant "deliberately elicited" information from respondent after formal criminal proceedings had begun, and thus the statements made by respondent to the informant are inadmissible because counsel was not present. The exclusion of respondent's statements has no relationship whatsoever to the reliability of the evidence, and it rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right. The Court's ruling is based on *Massiah* v. *United States*, 377 U. S. 201 (1964), which held that a postindictment confrontation between the accused and his accomplice, who had turned State's evidence and was acting under the direction of the Government, was a "critical" stage of the criminal proceedings at which the Sixth Amendment right to counsel attached. While the decision today sets forth the factors that are "important" in determining whether there

has been a *Massiah* violation, *ante*, at 270, I think that *Massiah* constitutes such a substantial departure from the traditional concerns that underlie the Sixth Amendment guarantee that its language, if not its actual holding, should be re-examined.

I

The doctrinal underpinnings of *Massiah* have been largely left unexplained, and the result in this case, as in *Massiah*, is difficult to reconcile with the traditional notions of the role of an attorney. Here, as in *Massiah*, the accused was not prevented from consulting with his counsel as often as he wished. No meetings between the accused and his counsel were disturbed or spied upon. And preparation for trial was not obstructed. See 377 U. S., at 209 (WHITE, J., dissenting). In short, as MR. JUSTICE WHITE aptly observed in *Massiah*:

> "It is only a sterile syllogism—an unsound one, besides—to say that because [the accused] had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence. The right to counsel has never meant as much before, *Cicenia* v. *Lagay*, 357 U. S. 504; *Crooker* v. *California*, 357 U. S. 433, and its extension in this case requires some further explanation, so far unarticulated by the Court." *Ibid.*

A

Our decisions recognize that after formal proceedings have commenced an accused has a Sixth Amendment right to counsel at "critical stages" of the criminal proceedings. See, *e. g.*, *ante*, at 269. This principle derives from *Powell* v. *Alabama*, 287 U. S. 45 (1932), which held that a trial court's failure to appoint counsel until the trial began violated the Due Process Clause of the Fourteenth Amendment. *Id.*, at 68–71. *Powell* referred to the "critical period" as being "from the time of [the defendants'] arraignment until the beginning of

their trial, when consultation, thoroughgoing investigation and preparation were vitally important." *Id.*, at 57. During that period, the defendants in *Powell* "did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Ibid.* They thus were deprived of the opportunity to consult with an attorney, and to have him investigate their case and prepare a defense for trial. After observing that the duty to assign counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case," *id.*, at 71, this Court held that the defendants had been unconstitutionally denied effective assistance of counsel.[1]

Powell was based on the rationale that an unaided layman, who has little or no familiarity with the law, requires assistance in the preparation and presentation of his case and in coping with procedural complexities in order to assure a fair trial. The Court in *Powell* stated:

> "Historically and in practice, in our country at least, [a hearing] has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be

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[1] The Court observed: "It is not enough to assume that counsel . . . precipitated into the case [on the morning of the trial] thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: '. . . The record indicates that the appearance was rather *pro forma* than zealous and active. . . .' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities." 287 U. S., at 58.

> heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.*, at 68–69.[2]

More recently this Court has again observed that the concerns underlying the Sixth Amendment right to counsel are to provide aid to the layman in arguing the law and in coping with intricate legal procedure, *United States* v. *Ash*, 413 U. S. 300, 307–308 (1973), and to minimize the imbalance in the adversary system that otherwise resulted with the creation of the

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[2] This rationale has also been applied to the arraignment, where "[a]vailable defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes," *Hamilton* v. *Alabama*, 368 U. S. 52, 54 (1961), and to a preliminary hearing, where such defenses may similarly be lost when the accused enters his plea. *White* v. *Maryland*, 373 U. S. 59 (1963). See also *United States* v. *Wade*, 388 U. S. 218 (1967) (lineup); *Mempa* v. *Rhay*, 389 U. S. 128 (1967) (combination probation-revocation and sentencing hearing); *Coleman* v. *Alabama*, 399 U. S. 1 (1970) (preliminary examination); *Moore* v. *Illinois*, 434 U. S. 220 (1977) (one-person showup at a hearing, which combined the functions of a preliminary arraignment and preliminary examination, that was adversary in nature and at which the accused was entitled to move for suppression of evidence and dismissal of charges).

professional prosecuting official. *Id.*, at 308–309.[3] Thus, in examining whether a stage of the proceedings is a "critical" one at which the accused is entitled to legal representation, it is important to recognize that the theoretical foundation of the Sixth Amendment right to counsel is based on the traditional role of an attorney as a legal expert and strategist.[4]

"Deliberate elicitation" after formal proceedings have begun is thus not by itself determinative. *Ash* held that an accused has no right to be present at a photo display because there is no possibility that he "might be misled by his lack of familiarity with the law or overpowered by his professional adversary." *Id.*, at 317. See also *Gilbert* v. *California*, 388 U. S. 263, 267 (1967) (taking of handwriting exemplars is not a "critical" stage of the proceedings because "there is a minimal risk that the absence of counsel might derogate from his right to a fair trial"). If the event is not one that requires knowledge of legal procedure, involves a communication between the accused and his attorney concerning investigation of the case or the preparation of a defense, or otherwise interferes with the attorney-client relationship, there is in my view simply no constitutional prohibition against the use of incriminating

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[3] As this Court stated in *Ash*, the "historical background suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." 413 U. S., at 309. The English common-law rule, which severely limited the right of a person accused of a felony to consult with counsel, was apparently rejected by the Framers' as inherently irrational. *Id.*, at 306–307.

[4] Any dealings that an accused may have with his attorney are of course confidential, and anything the accused says to his attorney is beyond the reach of the prosecution. But this Court has never held, nor does it hold today, that a confrontation or stage of the proceedings is critical because it may lead to the accused's conviction. Rather, the test under the Sixth Amendment as recognized in *Ash* "call[s] for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.*, at 313.

information voluntarily obtained from an accused despite the fact that his counsel may not be present. In such circumstances, the accused at the least has been informed of his rights as required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and often will have received advice from his counsel not to disclose any information relating to his case, see, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387 (1977).

Once the accused has been made aware of his rights, it is his responsibility to decide whether or not to exercise them. If he voluntarily relinquishes his rights by talking to authorities, or if he decides to disclose incriminating information to someone whom he mistakenly believes will not report it to the authorities, cf. *Hoffa* v. *United States*, 385 U. S. 293 (1966), he is normally accountable for his actions and must bear any adverse consequences that result. Such information has not in any sense been obtained because the accused's will has been overborne, nor does it result from any "unfair advantage" that the State has over the accused: the accused is free to keep quiet and to consult with his attorney if he so chooses. In this sense, the decision today and the result in *Massiah* are fundamentally inconsistent with traditional notions of the role of the attorney that underlie the Sixth Amendment right to counsel.

To the extent that *Massiah* relies on *Powell* v. *Alabama*, 287 U. S. 45 (1932), in concluding that the confrontation in that case was a "critical" stage of the proceedings, 377 U. S., at 205, *Massiah* reads the language of *Powell* out of context. In *Powell*, the period between arraignment and trial was critical because the defendants had no opportunity whatsoever to consult with an attorney during that time, and thus they were altogether deprived of legal assistance in the investigation of their case and the preparation of a defense. The Court today similarly takes an overly broad view of the stages after the commencement of formal criminal proceedings that should be viewed as "critical" for purposes of the Sixth Amendment. And it is not amiss to point out that *Powell* was decided solely

on the basis of the Due Process Clause of the Fourteenth Amendment long before the Court selected the Sixth Amendment as one that the Fourteenth Amendment "incorporated" and made applicable against the States as well as the United States. See *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

B

Massiah also relied heavily on a concurring opinion of its author in *Spano* v. *New York*, 360 U. S. 315 (1959), which expressed the notion that the adversary system commences with indictment, and should be followed by arraignment and trial. *Id.*, at 327 (STEWART, J., concurring). *Spano*, however, was a coerced confession case in which the accused was interrogated for eight hours after he had been indicted until he confessed. While it is true that both the Fifth and Sixth Amendments reflect the Framers' intent to establish essentially an accusatory rather than an inquisitorial system of justice, neither suggests by its terms a rigid dichotomy between the types of police activities that are permissible before commencement of formal criminal proceedings and those that are subsequently permissible. More specifically, there is nothing in the Sixth Amendment to suggest, nor does it follow from the general accusatory nature of our criminal scheme, that once the adversary process formally begins the government may not make any effort to obtain incriminating evidence from the accused when counsel is not present. The role of counsel in an adversary system is to offer advice and assistance in the preparation of a defense and to serve as a spokesman for the accused in technical legal proceedings. And the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney. But there is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the

behest of the prosecution. To the extent the accused is protected from revealing evidence that may be incriminatory, the focus must be on the Fifth Amendment privilege against compulsory self-incrimination. See, *e. g.*, *Spano* v. *New York*, *supra*; *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944).[5]

C

The objectives that underlie the exclusionary rule also suggest that the results reached in *Massiah* and the decision today are incorrect. Although the exclusion of reliable, probative evidence imposes tremendous costs on the judicial process and on society, see, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465 (1976), this Court has nonetheless imposed a rule for the exclusion of such evidence in some contexts in order to deter unlawful police activity. See, *e. g.*, *Weeks* v. *United States*, 232 U. S. 383 (1914); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). In cases in which incriminating statements made by the accused are entirely voluntary, however, and the government has merely encouraged a third party to talk to the accused and report any incriminating information that the accused might reveal, there is in my view no valid justification for the exclusion of such evidence from trial.[6]

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[5] Whatever may be the appropriate role of counsel in protecting the accused's privilege against *compulsory* self-incrimination, see, *e. g.*, *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979), when, as in this case, the accused merely engages in conversation with someone whom he does not know to be a governmental agent, the hazards of coercion and governmental overreaching are entirely absent.

[6] As stated by MR. CHIEF JUSTICE BURGER in his dissenting opinion in *Brewer* v. *Williams*, 430 U. S. 387, 421–422 (1977):

"[U]nlawfully obtained evidence is not automatically excluded from the factfinding process in all circumstances. In a variety of contexts we inquire whether application of the rule will promote its objectives sufficiently to justify the enormous cost it imposes on society. 'As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.' *United*

Ordinary citizens are expected to report any criminal activity they might observe, and they are often required under pain of compulsory process to reveal information that may incriminate others, even their friends and relatives. It generally does not matter that the information was obtained as a result of trust or confidence that develops from friendship or family ties. The incriminating information may still be obtained through use of the subpoena power, and in many instances of course it will be voluntarily revealed by the citizen interested in the enforcement of the laws.

In cases such as this one and *Massiah*, the effect of the governmental action is to encourage an informant to reveal information to the authorities that the ordinary citizen most likely would reveal voluntarily. While it is true that the informants here and in *Massiah* were encouraged to "elicit" the information from the accused, I doubt that most people would find this type of elicitation reprehensible. It involves merely engaging the accused in conversation about his criminal activity and thereby encouraging him voluntarily to make incriminating remarks. There is absolutely no element of coercion, nor is there any interference whatsoever with the attorney-client relationship. Anything the accused might reveal to the informant should, as with revelations he might make to the ordinary citizen, be available for use at trial. This Court has never held that an accused is constitutionally protected from his inability to keep quiet, whether or not he has been encouraged by third-party citizens to voluntarily make incriminating remarks. I do not think the result should be different merely because the government has encouraged a third-party informant to report remarks obtained in this fashion. When an accused voluntarily chooses to make an incriminatory re-

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States v. *Calandra*, [414 U. S. 338, 348 (1974)]; accord, *Stone* v. *Powell*, *supra*, at 486–491; *United States* v. *Janis*, [428 U. S. 433 (1976)]; *Brown* v. *Illinois*, 422 U. S. 590, 606–608–609 (1975) (POWELL, J., concurring in part); *United States* v. *Peltier*, [422 U. S. 531, 538–539 (1975)]." (Footnote omitted.)

mark in these circumstances, he knowingly assumes the risk that his confidant may be untrustworthy.[7]

II

In holding that the Government has "deliberately elicited" information from the accused here, the Court considers the following factors to be relevant:

> "First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols." *Ante*, at 270.

I disagree with the Court's evaluation of these factors, and would conclude that no deliberate elicitation has taken place.

A

The Court acknowledges that the use of undercover police-work is an important and constitutionally permissible method of law enforcement. *Ante*, at 272. As the Court observes, *Hoffa* v. *United States*, 385 U. S., at 302, for example, recognizes that the Constitution affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it," even if that person is an undisclosed informer. And in *Weatherford* v. *Bursey*, 429 U. S. 545, 557 (1977), we acknowledged the "necessity of undercover work" and "the value it often is to effective law enforcement." See also, *e. g.*, *United States* v. *Russell*, 411 U. S. 423, 432 (1973); *United States* v. *White*, 401 U. S. 745, 752 (1971).

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[7] Cf. *United States* v. *White*, 401 U. S. 745, 752 (1971), where this Court stated:

"Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his."

The Court nonetheless holds that once formal criminal proceedings have commenced, such undercover activity in some circumstances may not be constitutionally permissible even though it leads to incriminating statements by an accused that are entirely voluntary and inherently reliable. The reason for this conclusion is not readily apparent from the Court's opinion.

The fact that police carry on undercover activities should not automatically be transmuted because formal criminal proceedings have begun. It is true that once such proceedings have commenced, there is an "adversary" relationship between the government and the accused. But an adversary relationship may very well exist prior to the commencement of formal proceedings. And, as this Court has previously recognized, many events, while perhaps "adversarial," are not of such a nature that an attorney can provide any special knowledge or assistance to the accused as a result of his legal expertise. See, *e. g., United States* v. *Ash,* 413 U. S. 300 (1973) (no right to an attorney at pretrial photographic identifications at which the accused is not present); *Gilbert* v. *California,* 388 U. S., at 267 (no right to an attorney at taking of handwriting exemplars). When an attorney has no such special knowledge or skill, the Sixth Amendment does not give the accused a right to have an attorney present.

In addition, the mere bringing of formal proceedings does not necessarily mean that an undercover investigation or the need for it has terminated. A person may be arrested on the basis of probable cause arising in the immediate aftermath of an offense and during early stages of investigation, but before the authorities have had an opportunity to investigate fully his connection with the crime. And for the criminal, there is no rigid dichotomy between the time before commencement of formal criminal proceedings and the time after such proceedings have begun. Once out on bail the accused remains free to continue his criminal activity, and very well may decide to do so. See, *e. g., Rogers* v. *United States,* 325

F. 2d 485 (CA10 1963), cited in *Massiah* v. *United States*, 377 U. S., at 212 (WHITE, J., dissenting). Indeed, in *Massiah* itself there was evidence that after indictment one of the defendants attempted to persuade a Government agent to go into the narcotics business with him. *Id.*, at 212–213 (WHITE, J., dissenting). As the Court stated in *Massiah:* "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted." *Id.*, at 207. I would hold that the Government's activity here is merely a continuation of its lawful authority to use covert operations in investigating a criminal case after formal proceedings have commenced.[8]

B

The Court secondly states that here the informant ostensibly was no more than a fellow inmate, and thus the conversation "stimulated" by him may lead the accused to communicate information that he would not intentionally reveal to persons known to be government agents, who are "arm's-length" adversaries. While the Court deems relevant the question whether the informant took active steps as a result of a prearranged deal with the Government to elicit incriminating information from the accused, *ante*, at 273,[9] I do not think this

[8] I also disagree with the Court that the fact that Nichols was a paid informant and on a contingency fee is relevant in making this determination. See *ante*, at 270.

[9] It bears emphasis that even under the Court's holding today affirmative steps to induce the accused to reveal incriminating information are required before there can be a "deliberate" elicitation in violation of the Sixth Amendment. As noted by MR. JUSTICE POWELL in his concurring opinion:

"*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action. Thus, the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments. See *United States* v. *Hearst*, 563 F. 2d 1331, 1347–1348 (CA9 1977), cert. denied, 435 U. S. 1000 (1978). Similarly, the

type of encounter is one that is properly viewed as a critical stage at which counsel is necessary to provide guidance or protection to the accused to enable him to cope with unfamiliar legal proceedings, or to counterbalance the expertise of a professional prosecutor. Rather, as previously discussed, when the accused voluntarily reveals incriminating information to a third party in this context, I do not think there is any justification for excluding his admissions from trial, whether or not the third party was acting at the behest of the prosecution.

C

Finally, the Court considers relevant the fact that because the accused is confined and in custody, "subtle influences" are present "that will make him particularly susceptible to the ploys of undercover agents." *Ante*, at 274. An appeal to an accused's conscience or willingness to talk, however, does not in my view have a sufficiently overbearing impact on the accused's will to warrant special constitutional protection.

In the instant case, for example, if the informant had been in the cell next to respondent and overheard him make incriminating statements to his cellmate, no Sixth Amendment violation would have occurred. See, *e. g.*, *United States* v. *Hearst*, 563 F. 2d 1331, 1347–1348 (CA9 1977), cert. denied, 435 U. S. 1000 (1978). In such circumstances it would be clear that the Government had engaged in no affirmative conduct spe-

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mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional. In such a case, the question would be whether the informant's actions constituted deliberate and 'surreptitious interrogatio[n]' of the defendant. If they did not, there would be no interference with the relationship between client and counsel." *Ante*, at 276.

Deliberate elicitation does not and cannot depend on the subjective intention of the government or its informant to obtain incriminatory evidence from the accused within the limits of the law. Such an intention of course is the essence of conscientious policework.

cifically designed to extract incriminating statements from the accused. The same would be true if the accused made a statement that a prison guard happened to overhear. See, *e. g.*, *United States* v. *Barfield*, 461 F. 2d 661 (CA5 1972). I think there likewise is no Sixth Amendment violation when the accused's cellmate initiates conversation with him, and the accused makes incriminatory admissions. The fact that the cellmate is an informant has no impact on the accused, because the informant appears to him to be an ordinary cellmate. Whether the accused makes any statements is therefore dependent on his own disposition to do so, despite the fact that he is confined in a cell.

III

Finally, I disagree with the Court's reading of the facts, though that reading obviously narrows the scope of its holding. Here the District Court found that the Government did not employ Nichols to question respondent or to seek information from him, but merely to report what he heard. The Government had no part in having Nichols placed in the jail cell with respondent. App. to Pet. for Cert. 39a. And the record in my view fails to support the conclusion that Nichols engaged in any affirmative conduct to elicit information from respondent. The Court of Appeals did not either explicitly or implicitly find to the contrary. Thus, this Court's factual conclusions are not supported by the findings of the District Court. I consequently would conclude, as did the District Court, that here respondent has not been denied his Sixth Amendment right to counsel.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals.

Syllabus

DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* CHAKRABARTY

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

No. 79–136. Argued March 17, 1980—Decided June 16, 1980

Title 35 U. S. C. § 101 provides for the issuance of a patent to a person who invents or discovers "any" new and useful "manufacture" or "composition of matter." Respondent filed a patent application relating to his invention of a human-made, genetically engineered bacterium capable of breaking down crude oil, a property which is possessed by no naturally occurring bacteria. A patent examiner's rejection of the patent application's claims for the new bacteria was affirmed by the Patent Office Board of Appeals on the ground that living things are not patentable subject matter under § 101. The Court of Customs and Patent Appeals reversed, concluding that the fact that micro-organisms are alive is without legal significance for purposes of the patent law.

Held: A live, human-made micro-organism is patentable subject matter under § 101. Respondent's micro-organism constitutes a "manufacture" or "composition of matter" within that statute. Pp. 308–318.

(a) In choosing such expansive terms as "manufacture" and "composition of matter," modified by the comprehensive "any," Congress contemplated that the patent laws should be given wide scope, and the relevant legislative history also supports a broad construction. While laws of nature, physical phenomena, and abstract ideas are not patentable, respondent's claim is not to a hitherto unknown natural phenomenon, but to a nonnaturally occurring manufacture or composition of matter—a product of human ingenuity "having a distinctive name, character [and] use." *Hartranft* v. *Wiegmann*, 121 U. S. 609, 615. *Funk Brothers Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127, distinguished. Pp. 308–310.

(b) The passage of the 1930 Plant Patent Act, which afforded patent protection to certain asexually reproduced plants, and the 1970 Plant Variety Protection Act, which authorized protection for certain sexually reproduced plants but excluded bacteria from its protection, does not evidence congressional understanding that the terms "manufacture" or "composition of matter" in § 101 do not include living things. Pp. 310–314.

(c) Nor does the fact that genetic technology was unforeseen when Congress enacted § 101 require the conclusion that micro-organisms cannot qualify as patentable subject matter until Congress expressly authorizes such protection. The unambiguous language of § 101 fairly embraces respondent's invention. Arguments against patentability under § 101, based on potential hazards that may be generated by genetic research, should be addressed to the Congress and the Executive, not to the Judiciary. Pp. 314–318.

596 F. 2d 952, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and POWELL, JJ., joined, *post*, p. 318.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Shenefield, Harriet S. Shapiro, Robert B. Nicholson, Frederic Freilicher,* and *Joseph F. Nakamura.*

Edward F. McKie, Jr., argued the cause for respondent. With him on the brief were *Leo I. MaLossi, William E. Schuyler, Jr.,* and *Dale H. Hoscheit.**

**Leonard S. Rubenstein* filed a brief for the Peoples Business Commission as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *George W. Whitney, Bruce M. Collins,* and *Karl F. Jorda* for the American Patent Law Association, Inc.; by *Thomas D. Kiley* for Genentech, Inc.; by *Jerome G. Lee, William F. Dudine, Jr.,* and *Paul H. Heller* for the New York Patent Law Association, Inc.; by *Peter R. Taft, Joseph A. Keyes, Jr.,* and *Sheldon Elloit Steinbach* for Dr. Leroy E. Hood et al.; and by *Lorance L. Greenlee* for Dr. George Pieczenik.

Briefs of *amici curiae* were filed by *William I. Althen* for the American Society for Microbiology; by *Donald R. Dunner* for the Pharmaceutical Manufacturers Association; by *Edward S. Irons, Mary Helen Sears,* and *Donald Reidhaar* for the Regents of the University of California; and by *Cornell D. Cornish, pro se.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether a live, human-made micro-organism is patentable subject matter under 35 U. S. C. § 101.

I

In 1972, respondent Chakrabarty, a microbiologist, filed a patent application, assigned to the General Electric Co. The application asserted 36 claims related to Chakrabarty's invention of "a bacterium from the genus *Pseudomonas* containing therein at least two stable energy-generating plasmids, each of said plasmids providing a separate hydrocarbon degradative pathway." [1] This human-made, genetically engineered bacterium is capable of breaking down multiple components of crude oil. Because of this property, which is possessed by no naturally occurring bacteria, Chakrabarty's invention is believed to have significant value for the treatment of oil spills.[2]

Chakrabarty's patent claims were of three types: first, process claims for the method of producing the bacteria;

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[1] Plasmids are hereditary units physically separate from the chromosomes of the cell. In prior research, Chakrabarty and an associate discovered that plasmids control the oil degradation abilities of certain bacteria. In particular, the two researchers discovered plasmids capable of degrading camphor and octane, two components of crude oil. In the work represented by the patent application at issue here, Chakrabarty discovered a process by which four different plasmids, capable of degrading four different oil components, could be transferred to and maintained stably in a single *Pseudomonas* bacterum, which itself has no capacity for degrading oil.

[2] At present, biological control of oil spills requires the use of a mixture of naturally occurring bacteria, each capable of degrading one component of the oil complex. In this way, oil is decomposed into simpler substances which can serve as food for aquatic life. However, for various reasons, only a portion of any such mixed culture survives to attack the oil spill. By breaking down multiple components of oil, Chakrabarty's micro-organism promises more efficient and rapid oil-spill control.

second, claims for an inoculum comprised of a carrier material floating on water, such as straw, and the new bacteria; and third, claims to the bacteria themselves. The patent examiner allowed the claims falling into the first two categories, but rejected claims for the bacteria. His decision rested on two grounds: (1) that micro-organisms are "products of nature," and (2) that as living things they are not patentable subject matter under 35 U. S. C. § 101.

Chakrabarty appealed the rejection of these claims to the Patent Office Board of Appeals, and the Board affirmed the examiner on the second ground.[3] Relying on the legislative history of the 1930 Plant Patent Act, in which Congress extended patent protection to certain asexually reproduced plants, the Board concluded that § 101 was not intended to cover living things such as these laboratory created micro-organisms.

The Court of Customs and Patent Appeals, by a divided vote, reversed on the authority of its prior decision in *In re Bergy*, 563 F. 2d 1031, 1038 (1977), which held that "the fact that microorganisms . . . are alive . . . [is] without legal significance" for purposes of the patent law.[4] Subsequently, we granted the Acting Commissioner of Patents and Trademarks' petition for certiorari in *Bergy*, vacated the judgment, and remanded the case "for further consideration in light of *Parker* v. *Flook*, 437 U. S. 584 (1978)." 438 U. S. 902 (1978). The Court of Customs and Patent Appeals then vacated its judgment in *Chakrabarty* and consolidated the case with *Bergy* for reconsideration. After re-examining both cases in the light of our holding in *Flook*, that court, with one dissent, reaffirmed its earlier judgments. 596 F. 2d 952 (1979).

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[3] The Board concluded that the new bacteria were not "products of nature," because *Pseudomonas* bacteria containing two or more different energy-generating plasmids are not naturally occurring.

[4] *Bergy* involved a patent application for a pure culture of the micro-organism *Streptomyces vellosus* found to be useful in the production of lincomycin, an antibiotic.

The Commissioner of Patents and Trademarks again sought certiorari, and we granted the writ as to both *Bergy* and *Chakrabarty*. 444 U. S. 924 (1979). Since then, *Bergy* has been dismissed as moot, 444 U. S. 1028 (1980), leaving only *Chakrabarty* for decision.

II

The Constitution grants Congress broad power to legislate to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, § 8, cl. 8. The patent laws promote this progress by offering inventors exclusive rights for a limited period as an incentive for their inventiveness and research efforts. *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 470, 480–481 (1974); *Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471, 484 (1944). The authority of Congress is exercised in the hope that "[t]he productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives for our citizens." *Kewanee*, *supra*, at 480.

The question before us in this case is a narrow one of statutory interpretation requiring us to construe 35 U. S. C. § 101, which provides:

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

Specifically, we must determine whether respondent's microorganism constitutes a "manufacture" or "composition of matter" within the meaning of the statute.[5]

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[5] This case does not involve the other "conditions and requirements" of the patent laws, such as novelty and nonobviousness. 35 U. S. C. §§ 102, 103.

III

In cases of statutory construction we begin, of course, with the language of the statute. *Southeastern Community College* v. *Davis*, 442 U. S. 397, 405 (1979). And "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U. S. 37, 42 (1979). We have also cautioned that courts "should not read into the patent laws limitations and conditions which the legislature has not expressed." *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 199 (1933).

Guided by these canons of construction, this Court has read the term "manufacture" in § 101 in accordance with its dictionary definition to mean "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery." *American Fruit Growers, Inc.* v. *Brogdex Co.*, 283 U. S. 1, 11 (1931). Similarly, "composition of matter" has been construed consistent with its common usage to include "all compositions of two or more substances and . . . all composite articles, whether they be the results of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids." *Shell Development Co.* v. *Watson*, 149 F. Supp. 279, 280 (DC 1957) (citing 1 A. Deller, Walker on Patents § 14, p. 55 (1st ed. 1937)). In choosing such expansive terms as "manufacture" and "composition of matter," modified by the comprehensive "any," Congress plainly contemplated that the patent laws would be given wide scope.

The relevant legislative history also supports a broad construction. The Patent Act of 1793, authored by Thomas Jefferson, defined statutory subject matter as "any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement [thereof]." Act of Feb. 21, 1793, § 1, 1 Stat. 319. The Act embodied Jefferson's philosophy that "ingenuity should receive a liberal encouragement."

5 Writings of Thomas Jefferson 75–76 (Washington ed. 1871). See *Graham* v. *John Deere Co.*, 383 U. S. 1, 7–10 (1966). Subsequent patent statutes in 1836, 1870, and 1874 employed this same broad language. In 1952, when the patent laws were recodified, Congress replaced the word "art" with "process," but otherwise left Jefferson's language intact. The Committee Reports accompanying the 1952 Act inform us that Congress intended statutory subject matter to "include anything under the sun that is made by man." S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952); H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952).[8]

This is not to suggest that § 101 has no limits or that it embraces every discovery. The laws of nature, physical phenomena, and abstract ideas have been held not patentable. See *Parker* v. *Flook*, 437 U. S. 584 (1978); *Gottschalk* v. *Benson*, 409 U. S. 63, 67 (1972); *Funk Brothers Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127, 130 (1948); *O'Reilly* v. *Morse*, 15 How. 62, 112–121 (1854); *Le Roy* v. *Tatham*, 14 How. 156, 175 (1853). Thus, a new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that $E=mc^2$; nor could Newton have patented the law of gravity. Such discoveries are "manifestations of . . . nature, free to all men and reserved exclusively to none." *Funk*, *supra*, at 130.

Judged in this light, respondent's micro-organism plainly qualifies as patentable subject matter. His claim is not to a hitherto unknown natural phenomenon, but to a nonnaturally occurring manufacture or composition of matter—a product of human ingenuity "having a distinctive name, character [and]

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[8] This same language was employed by P. J. Federico, a principal draftsman of the 1952 recodification, in his testimony regarding that legislation: "[U]nder section 101 a person may have invented a machine or a manufacture, which may include anything under the sun that is made by man. . . ." Hearings on H. R. 3760 before Subcommittee No. 3 of the House Committee on the Judiciary, 82d Cong., 1st Sess., 37 (1951).

use." *Hartranft* v. *Wiegmann*, 121 U. S. 609, 615 (1887). The point is underscored dramatically by comparison of the invention here with that in *Funk*. There, the patentee had discovered that there existed in nature certain species of root-nodule bacteria which did not exert a mutually inhibitive effect on each other. He used that discovery to produce a mixed culture capable of inoculating the seeds of leguminous plants. Concluding that the patentee had discovered "only some of the handiwork of nature," the Court ruled the product nonpatentable:

> "Each of the species of root-nodule bacteria contained in the package infects the same group of leguminous plants which it always infected. No species acquires a different use. The combination of species produces no new bacteria, no change in the six species of bacteria, and no enlargement of the range of their utility. Each species has the same effect it always had. The bacteria perform in their natural way. Their use in combination does not improve in any way their natural functioning. They serve the ends nature originally provided and act quite independently of any effort of the patentee." 333 U. S., at 131.

Here, by contrast, the patentee has produced a new bacterium with markedly different characteristics from any found in nature and one having the potential for significant utility. His discovery is not nature's handiwork, but his own; accordingly it is patentable subject matter under § 101.

IV

Two contrary arguments are advanced, neither of which we find persuasive.

(A)

The petitioner's first argument rests on the enactment of the 1930 Plant Patent Act, which afforded patent protection to certain asexually reproduced plants, and the 1970 Plant

Variety Protection Act, which authorized protection for certain sexually reproduced plants but excluded bacteria from its protection.[7] In the petitioner's view, the passage of these Acts evidences congressional understanding that the terms "manufacture" or "composition of matter" do not include living things; if they did, the petitioner argues, neither Act would have been necessary.

We reject this argument. Prior to 1930, two factors were thought to remove plants from patent protection. The first was the belief that plants, even those artificially bred, were products of nature for purposes of the patent law. This position appears to have derived from the decision of the Patent Office in *Ex parte Latimer*, 1889 Dec. Com. Pat. 123, in which a patent claim for fiber found in the needle of the *Pinus australis* was rejected. The Commissioner reasoned that a contrary result would permit "patents [to] be obtained upon the trees of the forest and the plants of the earth, which of course would be unreasonable and impossible." *Id.*, at 126. The *Latimer* case, it seems, came to "se[t] forth the general stand taken in these matters" that plants were natural products not subject to patent protection. Thorne, Relation of Patent Law to Natural Products, 6 J. Pat. Off. Soc. 23, 24

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[7] The Plant Patent Act of 1930, 35 U. S. C. § 161, provides in relevant part:

"Whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propogated plant or a plant found in an uncultivated state, may obtain a patent therefor. . . ."

The Plant Variety Protection Act of 1970, provides in relevant part:

"The breeder of any novel variety of sexually reproduced plant (other than fungi, bacteria, or first generation hybrids) who has so reproduced the variety, or his successor in interest, shall be entitled to plant variety protection therefor. . . ." 84 Stat. 1547, 7 U. S. C. § 2402 (a).

See generally, 3 A. Deller, Walker on Patents, ch. IX (2d ed. 1964); R. Allyn, The First Plant Patents (1934).

(1923).[8] The second obstacle to patent protection for plants was the fact that plants were thought not amenable to the "written description" requirement of the patent law. See 35 U. S. C. § 112. Because new plants may differ from old only in color or perfume, differentiation by written description was often impossible. See Hearings on H. R. 11372 before the House Committee on Patents, 71st Cong., 2d Sess., 7 (1930) (memorandum of Patent Commissioner Robertson).

In enacting the Plant Patent Act, Congress addressed both of these concerns. It explained at length its belief that the work of the plant breeder "in aid of nature" was patentable invention. S. Rep. No. 315, 71st Cong., 2d Sess., 6–8 (1930); H. R. Rep. No. 1129, 71st Cong., 2d Sess., 7–9 (1930). And it relaxed the written description requirement in favor of "a description . . . as complete as is reasonably possible." 35 U. S. C. § 162. No Committee or Member of Congress, however, expressed the broader view, now urged by the petitioner, that the terms "manufacture" or "composition of matter" exclude living things. The sole support for that position in the legislative history of the 1930 Act is found in the conclusory statement of Secretary of Agriculture Hyde, in a letter to the Chairmen of the House and Senate Committees considering the 1930 Act, that "the patent laws . . . at the present time are understood to cover only inventions or discoveries in the field of inanimate nature." See S. Rep. No. 315, *supra*, at Appendix A; H. R. Rep. No. 1129, *supra*, at Appendix A. Secretary Hyde's opinion, however, is not entitled to controlling weight. His views were solicited on the administration of the new law and not on the scope of patent-

[8] Writing three years after the passage of the 1930 Act, R. Cook, Editor of the Journal of Heredity, commented: "It is a little hard for plant men to understand why [Art. I, § 8] of the Constitution should not have been earlier construed to include the promotion of the art of plant breeding. The reason for this is probably to be found in the principle that natural products are not patentable." Florists Exchange and Horticultural Trade World, July 15, 1933, p. 9.

able subject matter—an area beyond his competence. Moreover, there is language in the House and Senate Committee Reports suggesting that to the extent Congress considered the matter it found the Secretary's dichotomy unpersuasive. The Reports observe:

> "There is a clear and logical distinction *between the discovery of a new variety of plant and of certain inanimate things,* such, for example, as a new and useful natural mineral. The mineral is created wholly by nature unassisted by man. . . . On the other hand, a plant discovery resulting from cultivation is unique, isolated, and is not repeated by nature, nor can it be reproduced by nature unaided by man. . . ." S. Rep. No. 315, *supra,* at 6; H. R. Rep. No. 1129, *supra,* at 7 (emphasis added).

Congress thus recognized that the relevant distinction was not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions. Here, respondent's micro-organism is the result of human ingenuity and research. Hence, the passage of the Plant Patent Act affords the Government no support.

Nor does the passage of the 1970 Plant Variety Protection Act support the Government's position. As the Government acknowledges, sexually reproduced plants were not included under the 1930 Act because new varieties could not be reproduced true-to-type through seedlings. Brief for Petitioner 27, n. 31. By 1970, however, it was generally recognized that true-to-type reproduction was possible and that plant patent protection was therefore appropriate. The 1970 Act extended that protection. There is nothing in its language or history to suggest that it was enacted because § 101 did not include living things.

In particular, we find nothing in the exclusion of bacteria from plant variety protection to support the petitioner's position. See n. 7, *supra.* The legislative history gives no reason for this exclusion. As the Court of Customs and

Patent Appeals suggested, it may simply reflect congressional agreement with the result reached by that court in deciding *In re Arzberger*, 27 C. C. P. A. (Pat.) 1315, 112 F. 2d 834 (1940), which held that bacteria were not plants for the purposes of the 1930 Act. Or it may reflect the fact that prior to 1970 the Patent Office had issued patents for bacteria under § 101.[9] In any event, absent some clear indication that Congress "focused on [the] issues . . . directly related to the one presently before the Court," *SEC* v. *Sloan*, 436 U. S. 103, 120–121 (1978), there is no basis for reading into its actions an intent to modify the plain meaning of the words found in § 101. See *TVA* v. *Hill*, 437 U. S. 153, 189–193 (1978); *United States* v. *Price*, 361 U. S. 304, 313 (1960).

(B)

The petitioner's second argument is that micro-organisms cannot qualify as patentable subject matter until Congress expressly authorizes such protection. His position rests on the fact that genetic technology was unforeseen when Congress enacted § 101. From this it is argued that resolution of the patentability of inventions such as respondent's should be left to Congress. The legislative process, the petitioner argues, is best equipped to weigh the competing economic, social, and scientific considerations involved, and to determine whether living organisms produced by genetic engineering should receive patent protection. In support of this position, the petitioner relies on our recent holding in *Parker* v. *Flook*, 437 U. S. 584 (1978), and the statement that the judiciary "must proceed cautiously when . . . asked to extend

[9] In 1873, the Patent Office granted Louis Pasteur a patent on "yeast, free from organic germs of disease, as an article of manufacture." And in 1967 and 1968, immediately prior to the passage of the Plant Variety Protection Act, that Office granted two patents which, as the petitioner concedes, state claims for living micro-organisms. See Reply Brief for Petitioner 3, and n. 2.

patent rights into areas wholly unforeseen by Congress." *Id.*, at 596.

It is, of course, correct that Congress, not the courts, must define the limits of patentability; but it is equally true that once Congress has spoken it is "the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Congress has performed its constitutional role in defining patentable subject matter in § 101; we perform ours in construing the language Congress has employed. In so doing, our obligation is to take statutes as we find them, guided, if ambiguity appears, by the legislative history and statutory purpose. Here, we perceive no ambiguity. The subject-matter provisions of the patent law have been cast in broad terms to fulfill the constitutional and statutory goal of promoting "the Progress of Science and the useful Arts" with all that means for the social and economic benefits envisioned by Jefferson. Broad general language is not necessarily ambiguous when congressional objectives require broad terms.

Nothing in *Flook* is to the contrary. That case applied our prior precedents to determine that a "claim for an improved method of calculation, even when tied to a specific end use, is unpatentable subject matter under § 101." 437 U. S., at 595, n. 18. The Court carefully scrutinized the claim at issue to determine whether it was precluded from patent protection under "the principles underlying the prohibition against patents for 'ideas' or phenomena of nature." *Id.*, at 593. We have done that here. *Flook* did not announce a new principle that inventions in areas not contemplated by Congress when the patent laws were enacted are unpatentable *per se*.

To read that concept into *Flook* would frustrate the purposes of the patent law. This Court frequently has observed that a statute is not to be confined to the "particular application[s] . . . contemplated by the legislators." *Barr* v. *United States*, 324 U. S. 83, 90 (1945). Accord, *Browder* v. *United States*, 312 U. S. 335, 339 (1941); *Puerto Rico* v. *Shell Co.*,

302 U. S. 253, 257 (1937). This is especially true in the field of patent law. A rule that unanticipated inventions are without protection would conflict with the core concept of the patent law that anticipation undermines patentability. See *Graham* v. *John Deere Co.*, 383 U. S., at 12–17. Mr. Justice Douglas reminded that the inventions most benefiting mankind are those that "push back the frontiers of chemistry, physics, and the like." *Great A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U. S. 147, 154 (1950) (concurring opinion). Congress employed broad general language in drafting § 101 precisely because such inventions are often unforeseeable.[10]

To buttress his argument, the petitioner, with the support of *amicus*, points to grave risks that may be generated by research endeavors such as respondent's. The briefs present a gruesome parade of horribles. Scientists, among them Nobel laureates, are quoted suggesting that genetic research may pose a serious threat to the human race, or, at the very least, that the dangers are far too substantial to permit such research to proceed apace at this time. We are told that genetic research and related technological developments may spread pollution and disease, that it may result in a loss of genetic diversity, and that its practice may tend to depreciate the value of human life. These arguments are forcefully, even passionately, presented; they remind us that, at times, human ingenuity seems unable to control fully the forces it creates—that, with Hamlet, it is sometimes better "to bear those ills we have than fly to others that we know not of."

It is argued that this Court should weigh these potential hazards in considering whether respondent's invention is

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[10] Even an abbreviated list of patented inventions underscores the point: telegraph (Morse, No. 1,647); telephone (Bell, No. 174,465); electric lamp (Edison, No. 223,898); airplane (the Wrights, No. 821,393); transistor (Bardeen & Brattain, No. 2,524,035); neutronic reactor (Fermi & Szilard, No. 2,708,656); laser (Schawlow & Townes, No. 2,929,922). See generally Revolutionary Ideas, Patents & Progress in America, United States Patent and Trademark Office (1976).

patentable subject matter under § 101. We disagree. The grant or denial of patents on micro-organisms is not likely to put an end to genetic research or to its attendant risks. The large amount of research that has already occurred when no researcher had sure knowledge that patent protection would be available suggests that legislative or judicial fiat as to patentability will not deter the scientific mind from probing into the unknown any more than Canute could command the tides. Whether respondent's claims are patentable may determine whether research efforts are accelerated by the hope of reward or slowed by want of incentives, but that is all.

What is more important is that we are without competence to entertain these arguments—either to brush them aside as fantasies generated by fear of the unknown, or to act on them. The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.[11]

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[11] We are not to be understood as suggesting that the political branches have been laggard in the consideration of the problems related to genetic research and technology. They have already taken action. In 1976, for example, the National Institutes of Health released guidelines for NIH-sponsored genetic research which established conditions under which such research could be performed. 41 Fed. Reg. 27902. In 1978 those guidelines were revised and relaxed. 43 Fed. Reg. 60080, 60108, 60134. And Committees of the Congress have held extensive hearings on these matters. See, *e. g.*, Hearings on Genetic Engineering before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess. (1975); Hearings before the Subcommittee on Science, Technology, and Space of the Senate Committee on Commerce, Science, and Transportation, 95th Cong., 1st Sess. (1977); Hearings on H. R. 4759 et al. before the Subcommittee on Health and the Environment of the

We have emphasized in the recent past that "[o]ur individual appraisal of the wisdom or unwisdom of a particular [legislative] course . . . is to be put aside in the process of interpreting a statute." *TVA* v. *Hill*, 437 U. S., at 194. Our task, rather, is the narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted. Congress is free to amend § 101 so as to exclude from patent protection organisms produced by genetic engineering. Cf. 42 U. S. C. § 2181 (a), exempting from patent protection inventions "useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon." Or it may choose to craft a statute specifically designed for such living things. But, until Congress takes such action, this Court must construe the language of § 101 as it is. The language of that section fairly embraces respondent's invention.

Accordingly, the judgment of the Court of Customs and Patent Appeals is

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL join, dissenting.

I agree with the Court that the question before us is a narrow one. Neither the future of scientific research, nor even the ability of respondent Chakrabarty to reap some monopoly profits from his pioneering work, is at stake. Patents on the processes by which he has produced and employed the new living organism are not contested. The only question we need decide is whether Congress, exercising its authority under Art. I, § 8, of the Constitution, intended that he be able to secure a monopoly on the living organism itself, no matter how produced or how used. Because I believe the Court has misread the applicable legislation, I dissent.

House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. (1977).

The patent laws attempt to reconcile this Nation's deep-seated antipathy to monopolies with the need to encourage progress. *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 530–531 (1972); *Graham* v. *John Deere Co.*, 383 U. S. 1, 7–10 (1966). Given the complexity and legislative nature of this delicate task, we must be careful to extend patent protection no further than Congress has provided. In particular, were there an absence of legislative direction, the courts should leave to Congress the decisions whether and how far to extend the patent privilege into areas where the common understanding has been that patents are not available.[1] Cf. *Deepsouth Packing Co.* v. *Laitram Corp.*, *supra*.

In this case, however, we do not confront a complete legislative vacuum. The sweeping language of the Patent Act of 1793, as re-enacted in 1952, is not the last pronouncement Congress has made in this area. In 1930 Congress enacted the Plant Patent Act affording patent protection to developers of certain asexually reproduced plants. In 1970 Congress enacted the Plant Variety Protection Act to extend protection to certain new plant varieties capable of sexual reproduction. Thus, we are not dealing—as the Court would have it—with the routine problem of "unanticipated inventions." *Ante*, at 316. In these two Acts Congress has addressed the general problem of patenting animate inventions and has chosen carefully limited language granting protection to some kinds of discoveries, but specifically excluding others. These Acts strongly evidence a congressional limitation that excludes bacteria from patentability.[2]

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[1] I read the Court to admit that the popular conception, even among advocates of agricultural patents, was that living organisms were unpatentable. See *ante*, at 311–312, and n. 8.

[2] But even if I agreed with the Court that the 1930 and 1970 Acts were not dispositive, I would dissent. This case presents even more cogent reasons than *Deepsouth Packing Co.* not to extend the patent monopoly in the face of uncertainty. At the very least, these Acts are signs of legislative attention to the problems of patenting living organisms, but they give

First, the Acts evidence Congress' understanding, at least since 1930, that § 101 does not include living organisms. If newly developed living organisms not naturally occurring had been patentable under § 101, the plants included in the scope of the 1930 and 1970 Acts could have been patented without new legislation. Those plants, like the bacteria involved in this case, were new varieties not naturally occurring.[3] Although the Court, *ante*, at 311, rejects this line of argument, it does not explain why the Acts were necessary unless to correct a pre-existing situation.[4] I cannot share the Court's implicit assumption that Congress was engaged in either idle exercises or mere correction of the public record when it enacted the 1930 and 1970 Acts. And Congress certainly thought it was doing something significant. The Committee Reports contain expansive prose about the previously unavailable benefits to be derived from extending patent protection to plants.[5] H. R.

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no affirmative indication of congressional intent that bacteria be patentable. The caveat of *Parker* v. *Flook*, 437 U. S. 584, 596 (1978), an admonition to "proceed cautiously when we are asked to extend patent rights into areas wholly unforeseen by Congress," therefore becomes pertinent. I should think the necessity for caution is that much greater when we are asked to extend patent rights into areas Congress has foreseen and considered but has not resolved.

[3] The Court refers to the logic employed by Congress in choosing not to perpetuate the "dichotomy" suggested by Secretary Hyde. *Ante*, at 313. But by this logic the bacteria at issue here are distinguishable from a "mineral . . . created wholly by nature" in exactly the same way as were the new varieties of plants. If a new Act was needed to provide patent protection for the plants, it was equally necessary for bacteria. Yet Congress provided for patents on plants but not on these bacteria. In short, Congress decided to make only a subset of animate "human-made inventions," *ibid.*, patentable.

[4] If the 1930 Act's only purpose were to solve the technical problem of description referred to by the Court, *ante*, at 312, most of the Act, and in particular its limitation to asexually reproduced plants, would have been totally unnecessary.

[5] Secretary Hyde's letter was not the only explicit indication in the legislative history of these Acts that Congress was acting on the assumption

Rep. No. 91–1605, pp. 1–3 (1970); S. Rep. No. 315, 71st Cong., 2d Sess., 1–3 (1930). Because Congress thought it had to legislate in order to make agricultural "human-made inventions" patentable and because the legislation Congress enacted is limited, it follows that Congress never meant to make items outside the scope of the legislation patentable.

Second, the 1970 Act clearly indicates that Congress has included bacteria within the focus of its legislative concern, but not within the scope of patent protection. Congress specifically excluded bacteria from the coverage of the 1970 Act. 7 U. S. C. § 2402 (a). The Court's attempts to supply explanations for this explicit exclusion ring hollow. It is true that there is no mention in the legislative history of the exclusion, but that does not give us license to invent reasons. The fact is that Congress, assuming that animate objects as to which it had not specifically legislated could not be patented, excluded bacteria from the set of patentable organisms.

The Court protests that its holding today is dictated by the broad language of § 101, which cannot "be confined to the 'particular application[s] . . . contemplated by the legislators.'" *Ante*, at 315, quoting *Barr* v. *United States*, 324 U. S. 83, 90 (1945). But as I have shown, the Court's decision does not follow the unavoidable implications of the statute. Rather, it extends the patent system to cover living material

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that legislation was necessary to make living organisms patentable. The Senate Judiciary Committee Report on the 1970 Act states the Committee's understanding that patent protection extended no further than the explicit provisions of these Acts:

"Under the patent law, patent protection is limited to those varieties of plants which reproduce asexually, that is, by such methods as grafting or budding. No protection is available to those varieties of plants which reproduce sexually, that is, generally by seeds." S. Rep. No. 91–1246, p. 3 (1970).

Similarly, Representative Poage, speaking for the 1970 Act, after noting the protection accorded asexually developed plants, stated that "for plants produced from seed, there has been no such protection." 116 Cong. Rec. 40295 (1970).

even though Congress plainly has legislated in the belief that § 101 does not encompass living organisms. It is the role of Congress, not this Court, to broaden or narrow the reach of the patent laws. This is especially true where, as here, the composition sought to be patented uniquely implicates matters of public concern.

Syllabus

BROWN *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 79–5364. Argued March 25, 1980—Decided June 16, 1980

While petitioner's appeal from his felony conviction—based on a nonunanimous six-person jury verdict—was pending in the Louisiana Supreme Court, *Burch* v. *Louisiana*, 441 U. S. 130, was decided, holding unconstitutional those provisions of the Louisiana Constitution and Code of Criminal Procedure that sanctioned conviction of a nonpetty offense by a nonunanimous jury of six. The Louisiana Supreme Court thereafter affirmed petitioner's conviction, holding that the rule of *Burch* v. *Louisiana*, *supra*, should not be applied retroactively to cases tried by juries empaneled prior to the date of that decision.

Held: The judgment is reversed, and the case is remanded. Pp. 327–337; 337.

371 So. 2d 746, reversed and remanded.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concluded that the constitutional principle announced in *Burch* v. *Louisiana*, *supra*, that conviction of a nonpetty criminal offense in a state court by a nonunanimous six-person jury violates the accused's right to trial by jury guaranteed by the Sixth Amendment as applied to the States through the Fourteenth Amendment, should be given retroactive application. Pp. 327–337.

(a) The test for deciding whether a new constitutional doctrine should be applied retroactively contemplates the consideration of (i) the purpose to be served by the new doctrine; (ii) the extent of the reliance by law enforcement authorities on the old standards; and (iii) the impact on the administration of justice of a retroactive application of the new standards. Foremost among these factors is the first, and controlling significance will be given to factors (ii) and (iii) only when factor (i) does not clearly favor retroactivity or prospectivity. Pp. 327–329.

(b) *Burch* established that the concurrence of six jurors was constitutionally required to preserve the substance of the jury trial right and assure the reliability of the jury's verdict. The *Burch* rule's purpose to eliminate a practice that threatened the jury's ability properly to perform its function of determining the truth in serious criminal cases clearly requires retroactive application. Pp. 330–334.

(c) Due regard for the State's good-faith reliance on the old standards and the impact of retroactivity on the administration of justice does not

counsel a contrary result. Here, the element of justifiable reliance on pre-*Burch* standards is minimal, since unlike other cases that have been accorded prospective effect only, *Burch* did not overrule any prior decisions of this Court or invalidate a practice of heretofore unquestioned legitimacy. Similarly, retroactive application of the *Burch* rule here will not have a devastating impact on the administration of criminal law, since it appears that by 1979 only two States permitted conviction of nonpetty offenses by a nonunanimous six-member jury, and that one of them—Louisiana—did not institute its scheme until 1975. Moreover, the decision in this case will not affect the validity of all convictions obtained under Louisiana's unconstitutional jury practice during that 4-year period but only those in which it can be shown that the verdict was less than unanimous. Pp. 335–337.

MR. JUSTICE POWELL, joined by MR. JUSTICE STEVENS, being of the view that new constitutional rules should apply retroactively in cases still pending on direct review, such as the instant case, concurred in the judgment. P. 337.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which STEWART, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which STEVENS, J., joined, *post*, p. 337. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 337.

John Lawrence argued the cause and filed a brief for petitioner.

Thomas Chester argued the cause *pro hac vice* for respondent. With him on the brief were *William J. Guste, Jr.*, Attorney General of Louisiana, *Harry F. Connick*, and *Louise Korns*.

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN joined.

Burch v. *Louisiana*, 441 U. S. 130 (1979), held that conviction of a nonpetty criminal offense by a nonunanimous six-person jury violates the accused's right to trial by jury guaranteed by the Sixth and Fourteenth Amendments. The issue

in this case is whether the constitutional principle announced in *Burch* is to be given retroactive application.

I

On July 31, 1978, petitioner Darnell Brown was charged by bill of information in Orleans Parish with simple burglary, a felony punishable by confinement in the parish prison or state penitentiary for a maximum term of 12 years. La. Rev. Stat. Ann. § 14:62 (West Supp. 1979). At the time, the Louisiana Constitution and Code of Criminal Procedure provided that such crimes should be tried by a jury of six persons, five of whom must concur to render a verdict.[1] Before trial, petitioner filed a motion to quash pursuant to Art. 532 (9) of the Louisiana Code of Criminal Procedure, arguing that his "due

[1] Article 1, § 17, of the Louisiana Constitution of 1974 provides:

"A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. *A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict.* The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury." (Emphasis added.)

At the time of petitioner's trial, Art. 782 (A), La. Code Crim. Proc. Ann. (West Supp. 1978), provided:

"Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. *Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, five of whom must concur to render a verdict.*" (Emphasis added.)

Following our decision in *Burch* v. *Louisiana*, 441 U. S. 130 (1979), this statutory provision was amended to require a unanimous verdict of six-person juries. 1979 La. Acts, No. 56, § 2.

process rights under the Sixth and the Fourteenth Amendments to the United States Constitution as enunciated in *Ballew* v. *Georgia*, [435 U. S. 223 (1978),] will be violated by a less than unanimous vote by a six person jury." App. 5. Petitioner therefore requested the trial judge to order a jury of 12 or, in the alternative, to require a unanimous verdict of the jury of 6.

Petitioner's motion was denied, and on August 23 his trial commenced before a six-member jury. That same afternoon, after deliberating for approximately one hour, the jury returned a verdict of guilty. At petitioner's request, the court polled the jurors and ascertained that their vote was 5 to 1 to convict. Sentencing was set for August 30, at which time petitioner renewed his objection to the nonunanimous six-person verdict by a motion for new trial. The trial judge again denied the motion and sentenced petitioner to a term of 22 years' imprisonment at hard labor.[2]

Petitioner appealed his conviction to the Louisiana Supreme Court, assigning as principal error the trial judge's refusal to grant the motion to quash. On April 17, 1979, while petitioner's case was still pending on direct review in the Louisiana courts, *Burch* v. *Louisiana*, *supra*, was decided, holding unconstitutional those provisions of the Louisiana Constitution and Code of Criminal Procedure that sanctioned conviction of a nonpetty offense by a nonunanimous jury of six. Some five weeks later, on May 21, 1979, the Louisiana Supreme Court affirmed petitioner's conviction. Although it implicitly acknowledged that *Burch* requires unanimous verdicts by six-person juries in all future prosecutions of simple burglary,[3] the court nonetheless concluded, without elabora-

[2] Because petitioner had two prior convictions, he was charged and sentenced as a habitual offender under La. Rev. Stat. Ann. § 15:529.1 (West Supp. 1979).

[3] Cf. *State* v. *Jackson*, 370 So. 2d 570, decided April 19, 1979, in which the Louisiana Supreme Court held that *Burch* applies to all trials commenced after that date.

tion, that "the rule of *Burch*, *supra*, should *not* be applied retroactively to juries empaneled prior to the date of the *Burch* decision." 371 So. 2d 746, 748 (1979) (emphasis in original). We granted certiorari. 444 U. S. 990 (1979). We reverse.

II

Linkletter v. *Walker*, 381 U. S. 618 (1965), was the first instance in which the Court declined to apply a new doctrine respecting one of the provisions of the Bill of Rights retroactively for the benefit of a previously convicted defendant. In the intervening 15 years, we have often considered the question of the retroactivity of decisions expounding new constitutional rules of criminal procedure, and have endeavored to elaborate appropriate standards for determining which rules are to be accorded retrospective and which only prospective effect. From the welter of case law that has developed in this area, several unequivocal principles emerge to guide our analysis in the present case.

It is by now uncontroverted that "the Constitution neither prohibits nor requires retrospective effect." *Id.*, at 629. Thus, although before *Linkletter* new constitutional rules had been applied to cases that had become final before promulgation of the rule, see *id.*, at 628, and n. 13, that decision firmly settled that "in appropriate cases the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application." *Id.*, at 628; *Johnson* v. *New Jersey*, 384 U. S. 719, 726–727 (1966).

Similarly, it is clear that resolution of the question of retroactivity does not automatically turn on the particular provision of the Constitution on which the new prescription is based. "Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Id.*, at 728. Accordingly, the test con-

sistently employed by the Court to decide whether a new constitutional doctrine should be applied retroactively contemplates the consideration of three criteria: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967).

Moreover, our decisions establish that "[f]oremost among these factors is the purpose to be served by the new constitutional rule," *Desist* v. *United States*, 394 U. S. 244, 249 (1969), and that we will give controlling significance to the measure of reliance and the impact on the administration of justice "only when the purpose of the rule in question [does] not clearly favor either retroactivity or prospectivity." *Id.*, at 251; *Michigan* v. *Payne*, 412 U. S. 47, 55 (1973); see also *Hankerson* v. *North Carolina*, 432 U. S. 233, 242–244 (1977); *Adams* v. *Illinois*, 405 U. S. 278, 280 (1972) (plurality opinion of BRENNAN, J.). "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Williams* v. *United States*, 401 U. S. 646, 653 (1971) (plurality opinion of WHITE, J.). Accord, *Hankerson* v. *North Carolina*, *supra*, at 243; *Gosa* v. *Mayden*, 413 U. S. 665, 679 (1973) (plurality opinion of BLACKMUN, J.); *Ivan V.* v. *City of New York*, 407 U. S. 203, 204 (1972).

Finally, we have recognized that the extent to which the purpose of a new constitutional rule requires its retroactive application "is necessarily a matter of degree." *Johnson* v. *New Jersey*, *supra*, at 729. Constitutional protections are

frequently fashioned to serve multiple ends; while a new standard may marginally implicate the reliability and integrity of the factfinding process, it may have been designed primarily to foster other, equally fundamental values in our system of jurisprudence.[4] Not every rule that "tends incidentally" to avoid unfairness at trial must be accorded retroactive effect. *Gosa* v. *Mayden, supra,* at 680 (plurality opinion of BLACKMUN, J.). So, too, additional safeguards may already exist that minimize the likelihood of past injustices.[5] In short, "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.'" *Stovall* v. *Denno, supra,* at 298 (quoting *Johnson* v. *New Jersey, supra,* at 729). And only when an assessment of those probabilities indicates that the condemned practice casts doubt upon the reliability of the determinations of guilt in past criminal cases must the new procedural rule be applied retroactively.[6]

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[4] See, *e. g., Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 415 (1966); *Johnson* v. *New Jersey,* 384 U. S. 719, 729–730 (1966); *Gosa* v. *Mayden,* 413 U. S. 665, 681–682 (1973) (plurality opinion of BLACKMUN, J.).

[5] See, *e. g., Johnson* v. *New Jersey, supra,* at 730; *Stovall* v. *Denno,* 388 U. S. 293, 299 (1967); *Michigan* v. *Payne,* 412 U. S. 47, 54 (1973).

[6] The distinguishing characteristic of those new constitutional doctrines that are to be given retroactive effect has been described in myriad formulations. See, *e. g., Johnson* v. *New Jersey, supra,* at 727–728 ("the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent'"); *Stovall* v. *Denno, supra,* at 298 ("rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial"); *Roberts* v. *Russell,* 392 U. S. 293, 295 (1968) ("the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined"); *Williams* v. *United States,* 401 U. S. 646, 653 (1971) (opinion of WHITE, J.) ("the purpose of the new constitutional standard [is] to minimize or avoid arbitrary or unreliable results"); *id.,* at 655, n. 7 ("the use of such a 'condemned practice' in past criminal trials presents substantial likelihood that the results of a number of those trials were factually incorrect"); *United States* v. *U. S. Coin & Currency,* 401 U. S. 715, 723 (1971) ("a procedural rule which . . . undermine[s] the basic accuracy of the factfinding

III

With these principles in mind, then, we turn to consideration of the issue presented by this case: whether the rule of *Burch* v. *Louisiana* must be given retroactive effect. We conclude that it must.

A

The right to jury trial guaranteed by the Sixth and Fourteenth Amendments "is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan* v. *Louisiana*, 391 U. S. 145, 158 (1968). Trial by jury in serious criminal cases has long been regarded as an indispensable protection against the possibility of governmental oppression; the history of the jury's development demonstrates "a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." *Williams* v. *Florida*, 399 U. S. 78, 87 (1970). "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Id.*, at 100.

Although we have held that the constitutional guarantee of trial by jury prescribes neither the precise number that can constitute a jury, *Williams* v. *Florida*, *supra* (six-person jury does not violate Sixth and Fourteenth Amendments), nor

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process at trial"); *id.*, at 724 ("the failure to employ such rules at trial meant there was a significant chance that innocent men had been wrongfully punished in the past"); *Michigan* v. *Payne*, *supra*, at 61–62 (MARSHALL, J., dissenting) ("a rule that was central to the process of determining guilt or innocence, and whose application might well have led to the acquittal of the defendant"). While the precise verbalisms may vary, all encompass the notion that any rule which raises substantial doubts about the reliability of the jury's verdict should be applied retroactively.

the exact proportion of the jury that must concur in the verdict, *Apodaca* v. *Oregon*, 406 U. S. 404 (1972) (10-to-2 vote in state trial does not violate the Constitution), we have also declared that there do exist size and unanimity limits that cannot be transgressed if the essence of the jury trial right is to be maintained. Thus *Ballew* v. *Georgia*, 435 U. S. 223 (1978), held that a reduction in the size of a jury to below six persons in nonpetty criminal cases raises such substantial doubts as to the fairness of the proceeding and the jury's ability to represent the true sense of the community that it deprives the accused of his right to trial by jury. For "much the same reasons," we concluded in *Burch* that "conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee" and hence violates the Sixth Amendment as applied to the States through the Fourteenth. 441 U. S., at 138. Though the line separating the permissible jury practice from the impermissible may not be the brightest, cf. *Burch* v. *Louisiana*, *supra*, at 137; *Ballew* v. *Georgia*, 435 U. S., at 231–232 (opinion of BLACKMUN, J.); *id.*, at 245–246 (opinion of POWELL, J.), a line must be drawn somewhere, and the constitutional inviolability of that border must be scrupulously respected lest the purpose and functioning of the jury be seriously impaired.

We think it apparent that the rationale behind the constitutional rule announced in *Burch* mandates its retroactive application. MR. JUSTICE BLACKMUN's opinion in *Ballew*[†]

[†] MR. JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE STEVENS joined. 435 U. S., at 224. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL joined MR. JUSTICE BLACKMUN's opinion insofar as it held that the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons, but were of the view that the statute upon which the criminal prosecution was predicated was overbroad and therefore facially unconstitutional. *Id.*, at 246. MR. JUSTICE WHITE filed a statement concurring in the judgment, *id.*, at 245, and MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, filed a separate opinion concurring in the judgment. *Ibid.*

cataloged the several considerations that led the Court to conclude that the operation of the jury was inhibited to a constitutionally significant degree by reducing its size to five members. Prominent among these concerns was the recognition, supported by a number of empirical studies,[8] that a decline in jury size leads to less accurate factfinding and a greater risk of convicting an innocent person. *Id.*, at 232–235.[9] In addition, statistical and empirical data established that because of a concomitant decrease in the number of hung juries, a reduction in the size of the jury panel in criminal cases unfairly disadvantages one side—the defense. *Id.*, at 236.[10] Lastly, the opinion noted that the opportunity for meaningful and appropriate minority representation diminishes with the size of the jury. *Id.*, at 236–237.[11]

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[8] Almost all of the empirical research cited in MR. JUSTICE BLACKMUN'S opinion, see 435 U. S., at 231–232, n. 10, had been prompted by *Williams* v. *Florida*, 399 U. S. 78 (1970). In comparing 12- and 6-member juries, the Court there observed: "What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries." *Id.*, at 101.

[9] The data also showed that jury verdicts become less consistent as panel size decreases, a result that not only reduces the likelihood that a given jury will reach a "correct" result—that is, one that truly represents the consensus of the community—but also produces a greater proportion of aberrant compromise verdicts. See 435 U. S., at 234–235.

[10] There are three reasons why this is so. First, because as a practical matter the State will decline to reprosecute a given proportion of cases that have produced hung juries in a prior trial, a hung jury may effectively serve as an acquittal. Second, the effects of time on witnesses' memories and the benefits of exposure to the State's case will generally aid the defendant in any retrial. Lastly, because studies show that jurors are more prone to convict than acquit, see *id.*, at 235, and n. 19, a reduction in the number of hung juries will lead to a comparatively greater increase in the number of convictions than acquittals, thus operating to the defendant's disadvantage.

[11] On the basis of these considerations, MR. JUSTICE BLACKMUN'S opinion concluded:

"[T]he assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fun-

Identical considerations underlay our decision in *Burch*. The threat which conviction by a 5-to-0 verdict poses to the fairness of the proceeding and the proper role of the jury is not significantly alleviated when conviction is instead obtained by the addition of a sixth, but dissenting, ballot. When the requirement of unanimity is abandoned, the vote of this "additional" juror is essentially superfluous. The prosecution's demonstrated inability to convince all the jurors of the accused's guilt certainly does nothing to allay our concern about the reliability and accuracy of the jury's verdict. And while the addition of another juror to the five-person panel may statistically increase the representativeness of that body, relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard.[12]

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damental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance." *Id.*, at 239.

[12] A procedure that permits conviction by the nonunanimous verdict of a six-member jury significantly decreases the likelihood that the views of a minority faction will produce a hung jury, thus creating a further imbalance to the detriment of the defense. See n. 10, *supra*. If a minority viewpoint is shared by 10% of the community, a 12-member jury may be expected to include at least 1 minority representative 72% of the time, a 6-member jury would contain 1 such person 47% of the time, and a 5-member jury only 41% of the time. More important for our purposes, however, a six-member jury may be expected to include *two or more* minority voices in only 11% of the cases. As one acknowledged authority on jury research has explained:

"The important element to observe is that the abandonment of the unanimity rule is but another way of reducing the size of the jury. But it is reduction with a vengeance, for a majority verdict requirement is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority that is allowed to agree on a verdict." Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 722 (1971). See also M. Saks, Jury Verdicts 99 (1977).

In sum, *Burch* established that the concurrence of six jurors was constitutionally required to preserve the substance of the jury trial right and assure the reliability of its verdict. It is difficult to envision a constitutional rule that more fundamentally implicates "the fairness of the trial—the very integrity of the fact-finding process." *Linkletter* v. *Walker*, 381 U. S., at 639. "The basic purpose of a trial is the determination of truth," *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 416 (1966), and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself. The rule in *Burch* was directed toward elimination of just such a practice. Its purpose, therefore, clearly requires retroactive application.[13]

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[13] Nonetheless, respondent contends that the question of the retroactive application of *Burch* is controlled by *DeStefano* v. *Woods*, 392 U. S. 631 (1968), in which the Court refused to give retroactive effect to the extension in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), to state criminal defendants of the right to jury trial in serious cases. Respondent argues that if the complete absence of a jury does not impair the factfinding process so substantially as to require retroactivity, then surely the mere presence of a single dissenting juror ought not to compel retroactive application.

It bears repeating, however, that "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." *Johnson* v. *New Jersey*, 384 U. S., at 728. Thus our decision not to grant new trials, with juries, to all those who had been convicted of serious criminal offenses in trials without juries does not necessarily mean that a constitutional rule directed toward ensuring the proper functioning of the jury in those cases in which it *has been provided* must also be given only prospective effect. Cf. *Witherspoon* v. *Illinois*, 391 U. S. 510, 523, n. 22 (1968) (newly announced standards for selecting juries in capital cases must be applied retroactively). Rather, "we must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question.'" *Johnson* v. *New Jersey*, *supra*, at 728.

Once this principle is realized, it should be clear that today's holding is in no way inconsistent with *DeStefano*. While the Court there acknowl-

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Due regard for countervailing considerations—the State's good-faith reliance on the old standards and the impact of retroactivity on the administration of justice—does not counsel a contrary result. The element of justifiable reliance on pre-*Burch* standards is minimal here. Unlike other cases that have been accorded prospective effect only, *Burch* did not overrule any prior decisions of this Court or invalidate a practice of heretofore unquestioned legitimacy. See, *e. g.*, *Desist* v. *United States*, 394 U. S., at 250–251; *Stovall* v. *Denno*, 388 U. S., at 300; *Tehan* v. *United States ex rel. Shott*, *supra*, at 417. "Therefore, to build a case for good-faith reliance the State must wring from our decision[s] the negative implication" that conviction by a nonunanimous six-person jury does not offend the Sixth Amendment's guarantee. See *Adams* v. *Illinois*, 405 U. S., at 293 (Douglas, J., dissenting). Yet if any implication is to be drawn from our opinions prior to *Burch*, it could only be that such a procedure was of doubtful constitutionality. *Williams* v. *Florida*, 399 U. S. 78 (1970), for example, highlighted the fact that the

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edged that the right to jury trial generally tends to prevent arbitrariness and repression, 392 U. S., at 633, it also recognized that the decision in *Duncan* did not rest on the premise "'that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'" 392 U. S., at 633–634. See also *Daniel* v. *Louisiana*, 420 U. S. 31 (1975); *Gosa* v. *Mayden*, 413 U. S., at 680–681. Because other safeguards existed to ensure the integrity of the factfinding process, and in light of both the State's justifiable reliance on past opinions of this Court and the devastating impact on the administration of justice that retroactivity would entail, *Duncan* was applied prospectively only.

The instant case simply does not fit within *DeStefano*'s mold. As we have discussed in the text, the failure to provide petitioner with the constitutional guarantees announced in *Burch* raises serious doubts about the fairness of his trial and the reliability of the factfinding process. And as we explain below, retroactive application of *Burch* should not produce a significant disruption in the State's administration of its criminal laws.

six-member jury approved in that case was required to render a unanimous verdict. *Id.*, at 100, and n. 46. And *Burch*'s rule was distinctly foreshadowed by our decision in *Ballew*, which was handed down more than five months before petitioner's trial and which was specifically cited to the trial court as mandating unanimity in the verdict of a six-member jury. See *supra*, at 325–326. Cf. *Berger* v. *California*, 393 U. S. 314, 315 (1969).

Similarly, we are confident that retroactive application of the *Burch* rule will not have a devastating impact on the administration of the criminal law. It appears that by 1979 only two States—Louisiana and Oklahoma—permitted conviction of nonpetty offenses by a nonunanimous six-member jury, see *Burch* v. *Louisiana*, 441 U. S., at 138, and n. 12, and Louisiana, at least, did not institute its scheme until 1975.[14] Furthermore, today's decision will not affect the validity of all convictions obtained under Louisiana's unconstitutional jury practice during that 4-year period, but only those in which it can be shown that the vote was in fact less than unanimous. Thus the number of persons who would have to

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[14] In Louisiana prior to 1968, cases in which the defendant could not be sentenced to confinement at hard labor were tried by the judge without a jury; cases in which punishment at hard labor was optional, but not mandatory, were tried by a unanimous jury of 5; all other felonies were tried by a jury of 12. Following our decision in *Duncan* v. *Louisiana*, *supra*, the Louisiana Legislature amended its criminal code to require jury trials for all nonpetty offenses. See generally Comment, Jury Trial in Louisiana—Implications of Duncan, 29 La. L. Rev. 118 (1968). In 1974, the Louisiana Legislature, through revision of the State Constitution and Code of Criminal Procedure, again amended its jury trial provisions to allow for conviction by nonunanimous six-member juries in cases in which punishment may be imprisonment at hard labor. 1974 La. Acts, Ex. Sess., Nos. 23 and 25. See n. 1, *supra*. These alterations were effective January 1, 1975.

Oklahoma appears to have permitted nonunanimous six-member jury verdicts only in trials for misdemeanors and in proceedings for the violation of ordinances or regulations of cities and towns. See Okla. Const., Art. 2, § 19.

be retried or released does not approach the magnitude involved in some of our previous cases. See, *e. g., Linkletter* v. *Walker*, 381 U. S., at 637 (retroactive application would "tax the administration of justice to the utmost"); *Tehan* v. *United States ex rel. Shott*, 382 U. S., at 419 ("an impact upon the administration of their criminal law so devastating as to need no elaboration"); *DeStefano* v. *Woods*, 392 U. S. 631, 634 (1968). What little disruption to the administration of justice results from retroactive application of *Burch* "must be considered part of the price we pay for former failures to provide fair procedures." *Adams* v. *Illinois*, *supra*, at 297 (Douglas, J., dissenting).

Accordingly, the judgment of the Supreme Court of Louisiana is reversed. The case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEVENS joins, concurring in the judgment.

This Court announced its decision in *Burch* v. *Louisiana*, 441 U. S. 130 (1979), while the petitioner's objection to the nonunanimous verdict was pending on direct appeal. *Ante*, at 326. Since I believe that new constitutional rules should apply retroactively "in cases still pending on direct review," *Hankerson* v. *North Carolina*, 432 U. S. 233, 248 (1977) (POWELL, J., concurring in judgment), I concur in the judgment reversing the petitioner's conviction.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

I am in agreement with the Court on the content of the applicable standards for gauging the need for retroactivity, but I cannot concur in the Court's application of those standards in this case. The most important question here is whether it is probable that the Louisiana juries convicting on a vote of 5 to 1 convicted innocent persons. As the Court

states, "only when an assessment of those probabilities indicates that the condemned practice casts doubt upon the reliability of the determinations of guilt in past criminal cases must the new procedural rule be applied retroactively." *Ante*, at 329. Neither our precedents nor common experience supports the Court's conclusion that the 5-to-1 vote is inherently unreliable. Just as I think the Court has overstated the probabilities of jury error, I think it has unfairly understated the State's reliance on our prior law and the burdens on the administration of the Louisiana justice system which will be associated with today's ruling.

A

In *Williams* v. *United States*, 401 U. S. 646, 655, n. 7 (1971), we held that retroactivity is only appropriate where the former practice "presents substantial likelihood that the results of a number of those trials were factually incorrect." In *Hankerson* v. *North Carolina*, 432 U. S. 233, 243 (1977), we similarly concluded that the "major purpose" of the new rule must be to correct a process which "substantially impairs its truth-finding function" raising "serious questions about the accuracy of guilty verdicts in past trials" before a rule should be retroactively imposed. Quite simply, when five-sixths of the deliberating jurors reach a finding of guilt, I do not think that there is a substantial probability that their decision was wrong.

The Court stresses the part of MR. JUSTICE BLACKMUN'S opinion in *Ballew* v. *Georgia*, 435 U. S. 223 (1978), suggesting that some studies had indicated that the reliability of the truth-finding process declines when the jury size is reduced. But I do not think that those citations can be used here to support the conclusion that the jury verdicts in issue were probably inaccurate. First, the opinion in *Ballew* relies heavily on the conclusions that a jury of only five is too small in number to ensure effective deliberation and to ensure that someone among the group will have memory abilities suffi-

cient to aid the jury in those deliberations. *Id.*, at 241. These concerns are satisfied when the jury is composed of six members, even if one of those members is in the dissent. In fact, as indicated by *Johnson* v. *Louisiana*, 406 U. S. 356, 361 (1972), the presence of a dissenting juror strongly supports the inference that the jury has engaged in meaningful deliberation:

> "We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose—when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt."

Thus the jury that convicted petitioner satisfied the requirements of jury deliberation that the Court in *Ballew* found so critical. Further, our cases have indicated quite clearly that the degree of persuasion evidenced by a 5-to-1 vote is sufficient to meet the requirement that guilt be proved beyond a reasonable doubt. In *Johnson, supra*, this Court held that a 9-to-3 verdict could satisfy due process, or in other words, satisfy the requirement that guilt be proved beyond a reasonable doubt. The degree of persuasion found acceptable there was far less impressive than that demonstrated by the jury which convicted petitioner. And yet we said that guilt was

proved beyond a reasonable doubt in *Johnson*. I think here, too, we must then conclude that guilt was proved beyond a reasonable doubt. Since that is true, there has been no constitutionally unacceptable risk of erroneous convictions and *Burch* need not be applied retroactively.

There is a further weakness in the Court's estimation of the probabilities. We simply have no way of knowing whether the person voting to acquit would have held firm with further pressure by his fellow jurors. The Court's speculation about what would have happened had unanimity been required of Louisiana's six-man juries amounts to just that: speculation. As long as this Court has approved "*Allen* charges" in federal cases over which it may exercise its supervisory authority, it is difficult to say that a holdout juror might not ultimately have been persuaded by the five-member majority.

The Court's ruling is also at odds with our decisions in *Gosa* v. *Mayden*, 413 U. S. 665 (1973), and *DeStefano* v. *Woods*, 392 U. S. 631 (1968). In both of those cases, the Court declined to give retroactive effect to rulings that the right to jury trial had been totally denied under circumstances where our system of fairness required that it be afforded. Nevertheless, as we stated in *DeStefano*, the "values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *Id.*, at 634. The deprivations addressed in those cases were no less based on procedural reliability than was the decision in *Burch* v. *Louisiana*, 441 U. S. 130 (1979).

B

I also think that the Court has unduly minimized Louisiana's reliance on pre-*Burch* standards, and greatly underestimated the impact its ruling will have on the Louisiana judicial system. We have every reason to credit Louisiana with the presumption that its law was enacted in good faith. Prior to 1974, the Louisiana Constitution allowed for conviction by

unanimous five-person juries for certain offenses. La. Const., Art. 7, § 41 (1921). In 1974 this constitutional provision was replaced with the nonunanimous six-person jury provision. The coordinator of legal research for the Constitutional Convention explained in 1974 that he believed this provision satisfied the Federal Constitution, reasoning:

> "A six-man jury was upheld in *Williams* v. *Florida*, 399 U. S. 78 (1970). If 75 per cent concurrence (9/12) was enough for a verdict as determined in *Johnson* v. *Louisiana*, 406 U. S. 356 (1972), then requiring 83 per cent concurrence (5/6) ought to be within the permissible limits of *Johnson*." Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 56, n. 300 (1974).

The record similarly suggests that the administrative impact is substantial. In the first four months of 1979 in just Orleans Parish alone, 39 defendants were tried by six-person juries. Brief for Respondent 24, n. 43. The various courts in Louisiana apparently do not necessarily keep a record of the jury vote. *Id.*, at 28, n. 49. With this large number of six-person jury trials, the potential for disruption is substantial. And although the Court states that the decision will only have an impact where the defendant was "in fact" convicted by less than six, how is it to be established what "in fact" occurred without clear records? *Ante*, at 336. As stated in the opinion of MR. JUSTICE BLACKMUN in *Gosa*, *supra*:

> "Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses . . . no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment

was rendered or, in other words, when essential justice is not involved." 413 U. S., at 685.

Since *Burch* and *Ballew* held little more than that "lines must be drawn somewhere" 441 U. S., at 137; 435 U. S., at 239, Louisiana should not be required to retry defendants found guilty by reliable factfinders.

Syllabus

HICKS *v.* OKLAHOMA

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 78-6885. Argued March 26, 1980—Decided June 16, 1980

Upon the conviction of petitioner, a twice previously convicted felon, in an Oklahoma trial court, the jury imposed a 40-year sentence pursuant to instructions to do so under a provision of the state habitual offender statute mandating such a sentence. Thereafter, this provision was declared unconstitutional by the Oklahoma Court of Criminal Appeals in another case, but that court nevertheless affirmed petitioner's conviction and sentence, holding that he was not prejudiced by the impact of the invalid statute because his sentence was within the range of punishment that could have been imposed in any event.

Held: The State deprived petitioner of due process of law guaranteed by the Fourteenth Amendment. Under Oklahoma statutes, a convicted defendant is entitled to have his punishment fixed by the jury, and the jury, if it had been correctly instructed, could have imposed any sentence of not less than 10 years. Thus, the possibility that the jury would have returned a sentence of less than 40 years is substantial, and it is incorrect to say that petitioner could not have been prejudiced by the instruction requiring imposition of a 40-year prison sentence. Petitioner's interest in the exercise of the jury's discretion in imposing punishment is not merely a matter of state procedural law, but is a liberty interest that the Fourteenth Amendment preserves against arbitrary deprivation by the State. And the argument that, in view of the Court of Criminal Appeals' statutory authority to revise judgments on appeal, petitioner had no absolute right to a sentence imposed by a jury, is unpersuasive. Pp. 345-347.

Vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 347.

David M. Ebel, by appointment of the Court, 444 U. S. 988, argued the cause for petitioner. With him on the briefs was *Richard A. Sonntag*.

Janet L. Cox, Assistant Attorney General of Oklahoma,

argued the cause *pro hac vice* for respondent. With her on the brief was *Jan Eric Cartwright*, Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was brought to trial in an Oklahoma court on a charge of unlawfully distributing heroin. Since he had been convicted of felony offenses twice within the preceding 10 years, the members of the jury were instructed, in accordance with the habitual offender statute then in effect in Oklahoma,[1]

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[1] See 1976 Okla. Sess. Laws, ch. 94, § 1, codified at Okla. Stat., Tit. 21, § 51 (B) (Supp. 1977). The text of § 51 provided:

"(A) Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:

"1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.

"2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.

"3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years.

"(B) Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; provided, that felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location; provided, further, that nothing in this section shall abrogate or affect

that, if they found the petitioner guilty, they "shall assess [the] punishment at forty (40) years imprisonment." The jury returned a verdict of guilt and imposed the mandatory 40-year prison term.

Subsequent to the petitioner's conviction, the provision of the habitual offender statute under which the mandatory 40-year prison term had been imposed was in another case declared unconstitutional by the Oklahoma Court of Criminal Appeals. *Thigpen* v. *State*, 571 P. 2d 467, 471 (1977). On his appeal, the petitioner sought to have his 40-year sentence set aside in view of the unconstitutionality of this statutory provision. The Court of Criminal Appeals acknowledged that the provision was unconstitutional, but nonetheless affirmed the petitioner's conviction and sentence, reasoning that the petitioner was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event.[2] We granted certiorari to consider the petitioner's contention that the State deprived him of due process of law guaranteed to him by the Fourteenth Amendment. 444 U. S. 963.

By statute in Oklahoma, a convicted defendant is entitled to have his punishment fixed by the jury. Okla. Stat., Tit. 22,

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the punishment by death in all crimes now or hereafter made punishable by death."

The Oklahoma Legislature has since amended § 51 (B). See 1978 Okla. Sess. Laws, ch. 281, § 1, Okla. Stat., Tit. 21, § 51 (B) (Supp. 1979).

[2] "Defendant asserts in his fourth assignment of error that [Okla. Stat., Tit. 21,] § 51 (B), under which he was sentenced, is unconstitutional. We agree. This question was laid to rest by this Court in *Thigpen* v. *State*, Okla. Cr., 571 P. 2d 467 (1977). We must find however, that the defendant was not prejudiced by the use of this statute in that the sentence imposed is within the range of punishment authorized by the provisions of [Okla. Stat., Tit. 21,] § 51 (A)." *Hicks* v. *State*, No. F-77-751 (Mar. 8, 1979).

The decision of the Oklahoma Court of Criminal Appeals is unreported. A petition for rehearing was denied April 6, 1979.

§ 926 (1971).[3] Had the members of the jury been correctly instructed in this case, they could have imposed any sentence of "not less than ten . . . years." Okla. Stat., Tit. 21, § 51 (A)(1) (1971). The possibility that the jury would have returned a sentence of less than 40 years is thus substantial. It is, therefore, wholly incorrect to say that the petitioner could not have been prejudiced by the instruction requiring the jury to impose a 40-year prison sentence.

It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See *Vitek* v. *Jones*, 445 U. S. 480, 488–489, citing *Wolff* v. *McDonnell*, 418 U. S. 539; *Greenholtz* v. *Nebraska Penal Inmates, supra; Morrissey* v. *Brewer*, 408 U. S. 471. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.[4]

The State argues, however, that, in view of the revisory authority of the Oklahoma Court of Criminal Appeals, the petitioner had no absolute right to a sentence imposed by a

[3] Only if the jury fails to do so may the trial court impose sentence. Okla. Stat., Tit. 22, § 927 (1971).

[4] Because of our disposition of the case, we do not reach the petitioner's several other contentions.

jury. See Okla. Stat., Tit. 22, § 1066 (1971) ("The Appellate Court may reverse, affirm or modify the judgment appealed from. . ."). The argument is unpersuasive. The State concedes that the petitioner had a statutory right to have a jury fix his punishment in the first instance, and this is the right that was denied. Moreover, it is a right that substantially affects the punishment imposed. No case has been cited to us in which the Court of Criminal Appeals has increased a sentence on appeal, and the State's Assistant Attorney General indicated at oral argument that it was doubtful whether the appellate court had power to do so. In consequence, it appears that the right to have a jury fix the sentence in the first instance is determinative, at least as a practical matter, of the maximum sentence that a defendant will receive. Nor did the appellate court purport to cure the deprivation by itself reconsidering the appropriateness of the petitioner's 40-year sentence.[5] Rather, it simply affirmed the sentence imposed by the jury under the invalid mandatory statute. In doing so, the State deprived the petitioner of his liberty without due process of law.

Accordingly, the judgment is vacated, and the case is remanded to the Oklahoma Court of Criminal Appeals for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE REHNQUIST, dissenting.

The Court concludes that the Oklahoma Court of Criminal Appeals denied petitioner due process of law by refusing to vacate the sentence imposed at his trial for unlawful dis-

[5] Because the appellate court did not purport to resentence the petitioner, we have no occasion to consider his contention that due process of law requires that the State provide him with notice and a hearing, including the opportunity to present mitigating evidence, before appellate sentencing. See *McGautha* v. *California*, 402 U. S. 183, 218–220; *Specht* v. *Patterson*, 386 U. S. 605, 606. See also *Mempa* v. *Rhay*, 389 U. S. 128.

tribution of heroin. That conclusion, in turn, depends on the Court's assertion that petitioner was impermissibly denied his state-created right to be sentenced by a jury. Because I believe that the Court either mischaracterizes the right conferred by state law or erroneously assumes a deprivation of that right, I dissent.

The Court is undoubtedly correct that Oklahoma law does confer a right to have a sentence imposed by a jury. Okla. Stat., Tit. 22, § 926 (1971). But it is equally true that petitioner was sentenced by a jury. The question is whether that sentence was validly imposed, either as a matter of state or federal law. For if the petitioner was constitutionally sentenced by his jury in the first instance, he has been afforded the process the State guaranteed him. The Oklahoma court found that petitioner was not properly sentenced. If this conclusion rested on an interpretation of state law, or a *correct* interpretation of federal law, then I would have less difficulty agreeing with the Court that petitioner was entitled to a new jury sentencing under principles of due process. But the Court fails to inquire into the basis of the Oklahoma court's conclusion that petitioner was improperly sentenced in the first instance. That question is central to the resolution of the due process issue presented by the case. The Court simply assumes that the Oklahoma court found that petitioner had not been sentenced in conformity with *state* law. This is an assumption, however, that cannot be divined from the available state cases. Those cases in fact strongly indicate that the decision of the state court here rested on an *erroneous* interpretation of *federal* law, not state law. If so, the Oklahoma court decision refusing to afford petitioner an opportunity to be resentenced by a jury would be correct, albeit for the wrong reason.

The issue in this case, then, is whether petitioner's original sentence denied him equal protection. The Oklahoma sentencing statute in effect at the time of petitioner's trial was designed to provide for increased sentences to multiple offend-

ers of the criminal laws.* Under Okla. Stat., Tit. 21, § 51 (A) (Supp. 1977) a defendant who is found guilty of an offense punishable by a term of imprisonment in excess of 5 years, after having been convicted of *one* offense punishable by imprisonment, is subject to sentence, fixed by the jury, ranging from 10 years to apparent infinity. (Oklahoma juries have apparently exercised this discretion with great relish, imposing sentences as long as 1,500 years in prison for second-time offenders. See *Callins* v. *State*, 500 P. 2d 1333 (Crim. App. 1972).) Defendants convicted of more than one

*The text of Okla. Stat., Tit. 21, § 51 (Supp. 1977), provides:

"(A) Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:

"1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.

"2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.

"3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years.

"(B) Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; provided, that felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location; provided, further, that nothing in this section shall abrogate or affect the punishment by death in all crimes now or hereafter made punishable by death."

prior offense were subject to sentencing under § 51 (B). Section 51 (B) did not invest the jury with discretion to determine the length of the term of imprisonment. Instead the section provided a formula for determining the length of the mandatory sentence to be imposed by a jury pursuant to instruction. This statutory scheme permitted the jury to impose sentences on defendants with only one prior conviction far in excess of those which were specified for defendants with two or more prior convictions. In *Thigpen* v. *State*, 571 P. 2d 467 (Okla. Crim. App. 1977), decided after petitioner's mandatory sentence was imposed by the jury, a defendant with only one prior conviction challenged the constitutionality of the statute. The court concluded that this potential for disparate sentences rendered § 51 (B) "unconstitutional," and struck that section.

The *Thigpen* opinion does not indicate whether this conclusion is based on an interpretation of the State or Federal Constitution. The opinion does indicate, however, that in determining the constitutionality of the Act, the court had relied on an advisory opinion submitted by an Oklahoma state district judge. 571 P. 2d, at 471, n. 3. That advisory opinion is attached as an appendix to the court opinion. The position advocated in the advisory opinion is that the Oklahoma sentencing statute violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because of the potential for longer terms of imprisonment to those convicted of only one prior offense. The author of the advisory opinion relies exclusively on federal law in reaching this determination.

In this case, the Oklahoma court thought the federal equal protection holding in *Thigpen* applied to petitioner's sentencing as well. I cannot agree. Petitioner was a third-time offender who was given the benefit of the more lenient mandatory sentencing provisions before the decision in *Thigpen*. Thus he was not within the class of one-time offenders subject to more burdensome treatment under the statute. Since

petitioner was a member of the favored class, I cannot agree that petitioner's sentencing denied *him* equal protection or any other rights guaranteed under the Federal Constitution, I am unable to agree that due process required the State to afford him any additional opportunity to be sentenced by another jury, and would therefore affirm the judgment of the Court of Criminal Appeals of Oklahoma.

BRYANT ET AL. *v.* YELLEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79–421. Argued March 25, 1980—Decided June 16, 1980*

The principal question in this action is whether the general rule under federal reclamation laws limiting irrigation water deliveries from reclamation projects to 160 acres under single ownership applies to certain private lands in Imperial Valley, Cal., being irrigated with Colorado River water through the irrigation system constructed pursuant to the Boulder Canyon Project Act (Project Act). When the Project Act became effective in 1929, a large acreage was already being irrigated by water delivered by the Imperial Irrigation District (District) through a privately owned irrigation system. Under the Project Act and a 1932 implementing contract, the United States constructed and the District agreed to pay for a new irrigation system. The Project Act, which implemented and ratified the seven-State Colorado River Compact (Compact) allocating the river's waters, provides in § 6 that project works shall be used for "irrigation and domestic uses and satisfaction of present perfected rights in pursuance of" the Compact, and in § 14 provides that the reclamation law "shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." Section 46 of the Omnibus Adjustment Act of 1926 (1926 Act), a reclamation law, forbids delivery of reclamation project water to any irrigable land held in private ownership by one owner in excess of 160 acres. In contracting with the District for the building of the new irrigation system, the United States represented that the Project Act did not impose acreage limitations on lands that already had vested or present rights to Colorado River waters, and the United States officially adhered to that position until repudiating it in 1964. When the District refused to accept the Government's new position, the United States, in 1967, instituted the instant District Court proceedings for a declaratory judgment that the excess-acreage limitation of § 46 of the 1926 Act applies to all private lands in the District, whether or not they had been irrigated in 1929. Meanwhile, in original proceedings involving the determination of how the state-allocated waters under the

*Together with No. 79–425, *California et al.* v. *Yellen et al.*, and No. 79–435, *Imperial Irrigation District et al.* v. *Yellen et al.*, also on certiorari to the same court.

Compact and the Project Act should be divided, this Court recognized that a significant limitation on the power of the Secretary of the Interior (Secretary) under the Project Act was the requirement that he satisfy present perfected rights, and defined such rights under § 6 as those that had been acquired in accordance with state law and that had been perfected as of 1929 by the actual diversion of a specific quantity of water and its application to a defined area of land. *Arizona* v. *California*, 373 U. S. 546; 376 U. S. 340. And by a supplemental decree, 439 U. S. 419, this Court adjudged the District to have a present perfected right to a specified quantity of diversions from the mainstream or the quantity of water necessary to irrigate a specified number of acres, whichever was less. The District Court ruled against the Government in the instant action and, when the Government chose not to appeal, denied a motion to intervene for purpose of appeal that had been filed by respondents, a group of Imperial Valley residents who desired to purchase the excess lands that might become available at prices below the market value for irrigated land if § 46 were held applicable. The Court of Appeals reversed, holding that the appealing intervenors had standing under Art. III and that the 160-acre limitation of § 46 of the 1926 Act applied to Imperial Valley.

Held:

1. Since it is unlikely that any of the owners of excess lands would sell land at below current market prices absent the applicability of § 46, whereas it is likely that such lands would become available at less than market prices if § 46 were applied, the Court of Appeals properly concluded that respondents had a sufficient stake in the outcome of the controversy to afford them standing to appeal the District Court's decision, even though they could not with certainty establish that they would be able to purchase excess lands if § 46 were held applicable. Pp. 366–368.

2. Contrary to the Court of Appeals' conclusion, § 6 of the Project Act precludes application of the 160-acre limitation of § 46 of the 1926 Act to the lands under irrigation in Imperial Valley in 1929. Section 46 cannot be applied consistently with § 6 on the alleged ground that the perfected rights in Imperial Valley were owned by the District, not individual landowners, who were merely members of a class for whose benefit the water rights had been acquired and held in trust, and who had no right under the law to a particular proportion of the District's water. Such theory fails to take adequate account of § 6 and its implementation in this Court's opinion and decrees in *Arizona* v. *California*, which recognized that § 6 was an unavoidable limitation on the Secretary's power and that in satisfying "present perfected rights" the Secre-

tary must take account of state law. Prior to 1929 and ever since, the District, in exercising its rights as trustee, delivered water to individual farmer beneficiaries without regard to the amount of land under single ownership, and, as a matter of state law, not only did the District's water right entitle it to deliver water to the farms in the District regardless of size, but also the right was equitably owned by the beneficiaries to whom the District was obligated to deliver water. Pp. 368–374.

3. There is nothing in the Project Act's legislative history to cast doubt on the foregoing construction of the Act or to suggest that Congress intended § 14, by bringing the 1926 Act into play, to interfere with the delivery of water to those lands already under irrigation in Imperial Valley and having present perfected rights that the Secretary was bound to recognize. Moreover, the contemporary construction of the Project Act by the parties to the 1932 contract was that the acreage limitation did not apply to lands in the District presently being irrigated, and this contemporaneous view of the Act, which supports the foregoing construction of the legislation, was not officially repudiated by the Secretary until 1964. Pp. 374–378.

4. Further questions involving the applicability of acreage limitations to approximately 14,000 acres in addition to those that were under irrigation in 1929, and the determination whether a live dispute remains in light of the foregoing "perfected rights" holding, should be considered initially by the courts below. Pp. 378–379.

559 F. 2d 509, and 595 F. 2d 524 and 525, reversed in part, vacated in part, and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

Northcutt Ely and *Charles W. Bender* argued the cause for petitioners in all cases. With Mr. Ely on the briefs for petitioner Imperial Irrigation District in No. 79–435 were *Reginald L. Knox, Jr.*, *Frederick H. Ritts*, *Robert F. Pietrowski, Jr.*, *Ralph J. Gillis*, and *Charles E. Corker*. With Mr. Bender on the briefs for petitioners Bryant et al. in No. 79–421 were *Patrick Lynch*, *James V. Selna*, and *John F. Daum*. *George Deukmejian*, Attorney General, *R. H. Connett*, Assistant Attorney General, and *Douglas B. Noble*, Deputy Attorney General, filed a brief for the State of California, petitioner in all cases.

Arthur Brunwasser argued the cause and filed a brief for

respondents in all cases. *Solicitor General McCree* argued the cause for the United States in all cases. With him on the brief were *Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Mark I. Levy, Peter R. Steenland, Jr., Raymond N. Zagone,* and *Dirk D. Snel.*†

MR. JUSTICE WHITE delivered the opinion of the Court.

When the Boulder Canyon Project Act, 45 Stat. 1057, 43 U. S. C. § 617 *et seq.* (Project Act), became effective in 1929, a large area in Imperial Valley, Cal., was already being irrigated by Colorado River water brought to the Valley by a privately owned delivery and distribution system. Pursuant to the Project Act, the United States constructed and the Imperial Irrigation District (District) agreed to pay for a new diversion dam and a new canal connecting the dam with the District. The Project Act was supplemental to the reclamation laws, which as a general rule limited water deliveries from reclamation projects to 160 acres under single ownership. The Project Act, however, required that the Secretary of the Interior (Secretary) observe rights to Colorado River water that had been perfected under state law at the time the Act became effective. In the course of contracting with the District for the building of the new dam and canal and for the delivery of water to the District, the United States represented that the Project Act did not impose acreage limitations on lands that already had vested or present rights to Colorado River water. The United States officially adhered to that position until 1964 when it repudiated its prior construction of the Project Act and sued the District, claiming that the 160-acre limitation contained in the reclamation law applies to all privately owned lands in the District, whether or not they had been irrigated in 1929. The District Court found for the District and its landowners, 322 F. Supp. 11 (SD Cal.

†*Robert Marvin Teets, Jr., Christopher E. Hamilton, Ralph Santiago Abascal, Ellen Josephson,* and *Sidney M. Wolinsky* filed a brief for Pedro Duarte et al. as *amici curiae* urging affirmance in all cases.

1971), but the Court of Appeals reversed and sustained the Government's position, 559 F. 2d 509 (CA9 1977). We now reverse the Court of Appeals with respect to those lands that were irrigated in 1929 and with respect to which the District has been adjudicated to have a perfected water right as of that date, a water right which, until 1964, the United States Department of the Interior officially represented foreclosed the application of acreage limitations. The judgment is otherwise vacated.

I

Imperial Valley is an area located south of the Salton Sea in southeastern California. It lies below sea level, and is an arid desert in its natural state. In 1901, however, irrigation began in the Valley, using water diverted from the Colorado River, which in that area marks the border between California and Arizona. Until at least 1940, irrigation water was brought to the Valley by means of a canal and distribution system that were completely privately financed. On June 25, 1929, when the Project Act became effective, the District [1] was diverting, transporting, and delivering water to 424,145 acres of privately owned and very productive farmland in Imperial Valley.[2] Under neither state law nor private irrigation arrangements in existence in Imperial Valley prior to 1929 was there any restriction on the number of acres that a single landholder could own and irrigate.

Prior to 1929 and for several years thereafter, the water diverted from the Colorado River was carried to the Valley through the Alamo Canal, which left the river north of the

[1] Under California law, an irrigation district is a public corporation governed by a board of directors, usually elected by voters in the district. It is empowered to distribute and otherwise administer water for the beneficial use of its inhabitants and to levy assessments upon the lands served for the payment of its expenses.

[2] The parties stipulated that the value of agricultural products in the Valley, overall, increased from some $4 million in 1909 to approximately $200 million in 1965.

border with Mexico but then traversed Mexican territory for some 50 miles before turning northward into Imperial Valley. This distribution system, entirely privately financed and owned, comprised approximately 1,700 miles of main and lateral canals, all serving to divert and deliver the necessary waters to the lands in Imperial Valley.

The Project Act was the culmination of the efforts of the seven States in the Colorado River Basin to control flooding, regulate water supplies on a predictable basis, allocate waters among the Upper and Lower Basin States and among the States in each basin, and connect the river to the Imperial Valley by a canal that did not pass through Mexico.[3] In 1922, the seven States executed the Colorado River Compact (Compact) allocating the waters of the river between the Upper and Lower Basins, and among other things providing in Art. VIII that "[p]resent perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact."[4] The Project Act, passed in

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[3] The Colorado River was subject to flooding. In 1905, the river broke through its banks and flooded the Alamo Canal and Imperial Valley. The California Development Co., then the major force in Imperial Valley, sought financial assistance from the Southern Pacific Co. whose tracks were threatened by the floodwaters. The railroad, taking as security a controlling interest in the California Development Co., returned the river to its channel and ultimately foreclosed on its security, transferring these interests to the District. The District acquired certain mutual water companies in 1922–1923 and has been solely responsible since that time for the diversion, transportation, and distribution of water from the Colorado River to the Imperial Valley.

Difficulties also arose because the Alamo Canal passed through Mexican territory and hence was partly subject to Mexican sovereignty. As a Senate Committee remarked, a new canal would "end an intolerable situation, under which the Imperial Valley now secures its sole water supply from a canal running for many miles through Mexico. . . ." S. Rep. No. 592, 70th Cong., 1st Sess., 8 (1928).

[4] The provision apparently resulted from the concern of the farmers of Imperial Valley that after two decades of productive reliance on the

1928 and effective in 1929, implemented and ratified the Compact; contained its own formula for allocating Lower Basin water among California, Arizona, and Nevada, *Arizona* v. *California*, 373 U. S. 546 (1963); and authorized the construction of the works required for the harnessing and more efficient utilization of the unruly river. The principal works of the Project, consisting of the Hoover Dam at Black Canyon and the storage facilities behind it, served to implement the division of the Compact. The dam was completed and storage began in 1935.[5]

Section 1 of the Project Act, which provided for the dam at Black Canyon, also authorized the construction of a new canal, the All-American Canal, which would replace the Alamo Canal and would traverse only territory located in the United States. A new diversion dam for Imperial Valley water was also authorized. Section 1 went on to provide that no charge should be made for the storage or delivery of irrigation or potable water to Imperial or Coachella Valley.[6]

Alamo Canal Project, their existing water rights might be impaired by the Compact allocation. Delph Carpenter, one of the draftsmen of the Compact, testified in hearings on a precursor of the Project Act as follows:

"During the deliberations of the Colorado River Commission at Santa Fe, and after 10 days' work, a sketch or outline of the progress was released to the press, stating what had happened and the proposed terms of a treaty. . . . The Imperial Valley representatives were immediately responsive. They came before the Commission and presented their claims with great vigor. . . .

"In view of that claim, coming as it did from people who cultivated upward of half a million acres of very valuable land, . . . Article VIII of the compact was drawn at the last session of the proceedings." Hearings Pursuant to S. Res. 320 before the Senate Committee on Irrigation and Reclamation, 68th Cong., 2d Sess., pt. 1, p. 678 (1925).

[5] The genesis of the Project Act and of the Colorado River Compact is described at greater length in *Arizona* v. *California*, 373 U. S. 546, 552–562 (1963).

[6] Coachella Valley is an area lying north of Imperial Valley across the Salton Sea. Unlike Imperial Valley, it was not being irrigated with

Section 4 (a) of the Project Act conditioned the effectiveness of the Act on the ratification of the Compact by the signatory States.[7] Section 4 (b), as well as requiring contractual provision for the repayment of specified costs with respect to the Hoover Dam, required that before any money was appropriated for the Imperial Valley works, the Secretary was to make provision for revenues "by contract or otherwise" to insure payment of all "expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law." Section 5 authorized the Secretary to contract for the storage of water and for its delivery at such points on the river and the canal as were agreed upon. Contracts were to be for permanent service and were required before any person would be entitled to stored water.

Section 6 of the Project Act, of critical importance in these cases, mandated that the works authorized by § 1 were to be used: "First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power." Section 9 authorized the opening to entry of the public lands that would become irrigable by the Project but in tracts not greater than 160 acres in size in accordance with the provisions of the reclamation law.

Section 14 provided that the Project Act should be deemed supplemental to the reclamation law, "which said reclamation law shall govern the construction, operation, and management

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Colorado River water in 1929. Coachella Valley is not involved in these cases.

[7] Section 4 (a) also contained provisions which, together with the Secretary's power under § 5 to contract for storage and delivery of water with particular water users and with § 8's tying the Project Act and the Compact together, provided the basis for the Court's holding in *Arizona* v. *California* that the Project Act itself sufficiently revealed the intent of Congress with respect to the division of the project water among the Lower Basin States.

of the works herein authorized, except as otherwise herein provided." The "reclamation law" referred to was defined in § 12 as the Act of June 17, 1902 (Reclamation Act), 32 Stat. 388, and Acts amendatory thereof and supplemental thereto. One of the statutes amendatory of or supplemental to the Reclamation Act was the Omnibus Adjustment Act of 1926 (1926 Act), § 46 of which, 44 Stat. (part 2) 649, 43 U. S. C. § 423e, forbade delivery of reclamation project water to any irrigable land held in private ownership by one owner in excess of 160 acres,[8] and required owners to execute recordable contracts for the sale of excess lands before such lands could receive project water.

Pursuant to the Project Act, the United States and the District entered into a contract on December 1, 1932, providing for the construction of the Imperial Dam and the All-American Canal. The District undertook to pay the cost of the works, and to include within itself certain public lands of the United States and other specified lands.[9] The United States undertook to deliver to the Imperial Dam the water which would be carried by the new canal to the various lands to be served by it. The contract contained no acreage limitation provision. Pursuant to this contract, the United States constructed the Imperial Dam in the Colorado River—some

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[8] Section 46 provides in relevant part:

"No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction."

[9] In 1942, pursuant to this provision, the District expanded its boundaries to include 271,588 acres of the unpatented public lands.

distance below Black Canyon but upriver from the existing point of diversion—and the All-American Canal connecting the dam and Imperial Valley. Use of the canal began in 1940, and by 1942 it carried all Colorado River water used by Imperial Valley.[10]

Article 31 of the contract between the District and the United States provided that the United States would not be bound by the contract until and unless court proceedings had been instituted by the District and a final judgment obtained confirming the authorization and the validity of the contract.[11] Such an action, entitled *Hewes* v. *All Persons*, No. 15460, Superior Court, Imperial County, was instituted and final

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[10] The All-American Canal system was not declared completed until 1952. By that time, pursuant to the 1932 contract, the care, operation, and maintenance of the system, with specified exceptions, had been transferred to the District, although title to the Imperial Dam and the canal remained in the United States. Repayment of construction charges commenced on March 1, 1955. The District's financial obligation was determined to be approximately $25 million, repayable in 40 annual installments, without interest. All payments to date have been made from net power revenues derived from the sale of electrical energy generated by hydroelectrical facilities of the All-American Canal, facilities which cost the District approximately $15 million.

[11] The Act of May 15, 1922, ch. 190, § 1, 42 Stat. 541, 43 U. S. C. § 511, authorized the Secretary to contract with irrigation districts but provided that no contract under the section "shall be binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid." The 1926 Act also required that the "execution" of the contracts referred to in the section be judicially confirmed.

In addition, the law of California specified preconditions to the effectiveness of water district contracts. Approval by the governing body was required as well as by district members voting in an election for that purpose. A district was also permitted to submit the contract to Superior Court for validation proceedings. The decree in *Hewes* v. *All Persons*, discussed in the text, concluded that California law had been satisfied in all respects.

judgment was entered on July 1, 1933, confirming the validity of the contract in all respects. App. to Pet. for Cert. in No. 79–435, pp. 120a–154a. In connection with these proceedings, the then Secretary, Ray Lyman Wilbur, on February 24, 1933, submitted a letter to the District dealing with the question whether the 160-acre limitation of the reclamation law was applicable in Imperial Valley. Among other things, the letter stated:

> "Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas." [12]

The trial court in the *Hewes* case expressly found and concluded that eligibility for project water was not limited to 160-acre tracts in single ownership.[13] An appeal in the case was dismissed before judgment. The United States was not a party to the action.

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[12] App. 177a, 71 I. D. 496, 530 (1964). Secretary Wilbur's letter referred specifically only to the applicability of § 5 of the Reclamation Act to the privately owned district lands. Five days later, the Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, Porter W. Dent, issued a letter confirming that the Department's interpretation likewise applied to § 46 of the 1926 Act. App. 179a, 71 I. D., at 531.

[13] Finding of Fact No. 35 in pertinent part said that under the 1932 contract, "the delivery of water will not be limited to 160 acres in a single ownership . . . and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned." App. to Pet. for Cert. in No. 79–435, p. 144a. Conclusion of Law No. XI stated that "neither the United States nor Imperial Irrigation District is limited by the terms of said contract or by any law applicable thereto in the delivery of water to any maximum acreage of land held in a single ownership." *Id.*, at 149a.

The Wilbur letter expressing the view that lands under irrigation at the time the Project Act was passed and having a present water right were not subject to the 160-acre limitation remained the official view of the Department of the Interior until 1964 [14] when the Department adopted the view

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[14] As the District Court pointed out, there was no suggestion by anyone during the construction of the All-American Canal that acreage limitations would be applicable to lands under cultivation in 1929. And based on its own "thorough review of Departmental policy," the District Court also concluded that the Wilbur interpretation of the Project Act remained the official view of the United States "during the incumbencies of six successor Secretaries and four Presidential administrations." 322 F. Supp. 11, 26 (SD Cal. 1971).

In 1942, in response to inquiry from the Federal Land Bank as to the applicability of the 160-acre limitation in Imperial Valley, the Commissioner of the Bureau of Reclamation replied in the negative. In 1944, Assistant Commissioner of Reclamation Warne testified before a Senate Subcommittee that "the limitation was never applied under the law to the Imperial Valley, except as a matter of new lands . . . ," and went on to make the Wilbur letter part of the Subcommittee's record. Hearings on H. R. 3961 before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., pt. 4, pp. 599, 764–765 (1944).

In 1945, the Solicitor of the Interior Department ruled that the 160-acre limitation was applicable to Coachella Valley. 71 I. D., at 533. In the course of the opinion, he also disagreed with the Wilbur letter with respect to Imperial Valley, but did not purport to overrule it. In 1948, Secretary Krug, in response to an inquiry from a veterans' organization, issued a letter affirming the Department's adherence to the Wilbur ruling. App. 253a–254a.

In 1952, after several years of negotiations, changes were effected in the 1932 contract between the District and the United States, but the Department did not insist that an acreage limitation be included or that the Wilbur position be abandoned.

In response to inquiry from the Solicitor General in 1958, the then Solicitor of the Department of the Interior reaffirmed the Department's position with respect to the Wilbur letter. *Id.*, at 255a–260a. The Solicitor General, however, without the concurrence of the Department, answered the inquiry of the Special Master in *Arizona* v. *California*, suggesting that the question of acreage limitations was irrelevant to the proceedings before the Master but also indicating in a footnote his disagree-

of its then Solicitor that the limitation should have applied to all Imperial Valley lands in private ownership.

Meanwhile, it having become apparent that neither the Compact nor the Project Act settled to the satisfaction of the Lower Basin States how the water allocated to them should be divided, an original action was begun in this Court in 1952 to settle this fundamental question and related issues, including the ascertainment of present perfected rights the unimpaired preservation of which was required by both the Compact and the Project Act. After more than 10 years of litigation, the opinion in *Arizona* v. *California* was handed down on June 3, 1963. 373 U. S. 546. Although the dispute among the Lower Basin States was at the heart of the controversy, for present purposes the primary aspect of the case was the recognition given to present perfected rights in the opinion and the ensuing decrees.

The opinion recognized that under § 14 of the Project Act, the construction, operation, and management of the works were to be subject to the provisions of the reclamation law, except as the Act otherwise provided, and that one of the most significant limitations in the Project Act on the Secretary's authority to contract for the delivery of water is the requirement to satisfy present perfected rights, "a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective." 373 U. S., at 584. The decree, which was entered on March 9, 1964, 376 U. S. 340, defined a perfected right as:

> "[A] water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a

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ment with the Wilbur letter and the Department's position. App. 260a–263a. Also in 1958, the Solicitor General expressed the same opinion in the *Ivanhoe* litigation. Brief for United States as *Amicus Curiae* in *Ivanhoe Irrig. Dist.* v. *McCracken*, O. T. 1957, Nos. 122 *et al.*, p. 37, n. 9. It was not until 1964 that the Secretary repudiated the Department's prior position. 71 I. D. 496.

> defined area of land or to definite municipal or industrial works. . . ." *Id.*, at 341.

Present perfected rights were defined as those perfected rights "existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act." *Ibid.* The decree also provided for the future determination of the specific present perfected rights in each of the Lower Basin States. A supplemental decree was eventually forthcoming, 439 U. S. 419 (1979), and in that decree the Imperial Irrigation District was adjudged to have a present perfected right

> "in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901." *Id.*, at 429.

As already indicated, the Department of the Interior repudiated the Wilbur interpretation of the Project Act in 1964. It then sought to include its revised position in a renegotiated contract with the District. When the District refused to accept the Department's position, the United States sued the District in 1967 for a declaratory judgment that the excess-acreage limitation of § 46 applied to all private lands in the Valley. The District Court permitted several Imperial Valley landowners to intervene as defendants representing the certified class of all landowners owning more than 160 acres.[15] It then ruled against the Government, holding for several reasons that "the land limitation provisions of reclamation law have no application to privately owned lands lying within the Imperial Irrigation District" and that the District is not bound to observe such limitations. 322 F. Supp., at 27. The Department of the Interior recommended and the Solicitor

[15] The District Court found that there were some 800 owners in the District owning in the aggregate approximately 233,000 acres of excess land. 322 F. Supp., at 12.

General decided, after reviewing the case, that an appeal not be prosecuted on behalf of the United States.[16] In consequence, respondents, a group of Imperial Valley residents, who had been given leave to participate as *amici* in the District Court and who desired to purchase the excess lands that might become available if § 46 were held applicable, attempted to intervene for purpose of appeal, but the District Court denied the motion. The Court of Appeals reversed the denial, 559 F. 2d, at 543–544, and proceeded to hold that the appealing intervenors had standing under Art. III of the Constitution; that *Hewes* v. *All Persons* was not conclusive with respect to acreage limitation; that the clear import of § 46 and the Project Act was that the 160-acre limitation is applicable to the Imperial Valley; and that the Department's administrative practice over the years did not bar application of the limitation to the Valley.

Because of the importance of these cases, we granted the petitions for writs of certiorari filed by the District, the landowners, and the State of California. 444 U. S. 978 (1979).

II

As a preliminary matter, we agree with the Court of Appeals that the respondents who sought to enter the suit when the United States forwent an appeal from the District Court's adverse decision had standing to intervene and press the appeal on their own behalf. Respondents, most of whom are farmworkers, reside in Imperial Valley. The essence of their claim was that they desired to purchase farmlands in Im-

[16] As indicated in a memorandum for the file prepared by the Solicitor General, the essence of the case for him was that an official construction of the Project Act had been made by the Department and followed for 38 years. To overturn such a longstanding administrative decision did "not strike [the Solicitor General] as good administration, or good government." 126 Cong. Rec. 3281 (1980). He concluded that an appeal to the Court of Appeals should not be taken because it would not, and, in his view, should not be successful. His second reason was prophetic.

perial Valley and that if § 46 were applied as they believed it should be, there would be excess lands available for purchase at prices below the market value for irrigated land.[17] The Court of Appeals, although recognizing that no owner of excess lands would be required to sell, concluded that it would be highly improbable that all owners of excess lands would prefer to withdraw their irrigable lands from agriculture in order to avoid § 46. In these circumstances, the Court of Appeals ruled that under *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977), and other cases, respondents had standing even though they could not with certainty establish that they would be able to purchase excess lands if § 46 were held applicable.[18]

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[17] Excess land offered for sale pursuant to § 46 must be sold at a price fixed by the Secretary of the Interior "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works. . . ." The Secretary may "cancel the water right attaching to the land" if it is sold for a different price. Because the federal reclamation project has added substantially to the value of land in the District, excess lands would be sold at prices far below their current fair market values. Since purchasers of such land would stand to reap significant gains on resale, the absence of detailed information about respondents' financial resources does not defeat respondents' claim of standing. Even if improvements to the land, such as installation of drainage systems, have enhanced its value, the potential windfall would remain and petitioners would possess a further incentive for offering excess lands for sale—to recoup the value of improvements—rather than withdrawing them from agricultural uses.

While the prospect of windfall profits could attract a large number of potential purchasers of the excess lands, respondents' interest is not "shared in substantially equal measure by all or a large class of citizens," *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975), because respondents are residents of the Imperial Valley who desire to purchase the excess land for purposes of farming.

[18] In a subsequent opinion denying rehearing, the Court of Appeals reaffirmed that respondents had standing. 595 F. 2d 525 (1979). The court rejected the argument that because the District had repaid more than one-half of the construction costs of the irrigation project the Secretary no longer had the authority to fix sale prices for excess land. Section

This was a proper application of our cases. It being unlikely that any of the 800 owners of excess lands would sell land at below current market prices absent the applicability of § 46 and it being likely that excess lands would become available at less than market prices if § 46 were applied, the Court of Appeals properly concluded that respondents had a sufficient stake in the outcome of the controversy to afford them standing to appeal the District Court's decision.

III

We are unable, however, to agree with the Court of Appeals that Congress intended that the 160-acre limitation of the 1926 Act would apply to the lands under irrigation in Imperial Valley in 1929.[19] Under § 14 of the Project Act, the construction, operation, and management of the project works were to be governed by the reclamation law, but only if not otherwise provided for in the Project Act. Section 46 of the 1926 Act is one of the reclamation laws; and its acreage limita-

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46 provides in pertinent part that "until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior. . . ." The Court of Appeals concluded that this portion of § 46 did not apply with respect to the initial breakup of excess lands for which the Secretary must fix the sale price "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works."

[19] Ever since its enactment in 1902, the reclamation law has generally limited to 160 acres the amount of private land in single ownership eligible to receive water from a reclamation project. This limitation helps open project lands to settlement by farmers of modest means, insures wide distribution of the benefits of federal projects, and guards against the possibility that speculators will earn windfall profits from the increase in value of their lands resulting from the federal project. See also *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U. S. 275, 292 (1958). The excess-acreage limitation has been retained in successive statutes culminating in § 46 of the 1926 Act.

tion, which expressly applies to contracts for "constructing, operating, and maintaining" project works, would appear to govern the delivery of project water unless its applicability is foreclosed by some other provision of the Project Act. The Court of Appeals, erroneously we think, found no such preclusion in § 6 of the Act.

Concededly, nothing in § 14, in § 46, or in the reclamation law in general would excuse the Secretary from recognizing his obligation to satisfy present perfected rights in Imperial Valley that were provided for by Art. VIII of the Compact and § 6 of the Project Act and adjudicated by this Court in *Arizona* v. *California*, 373 U. S. 546 (1963). The Court of Appeals neverthless held that § 46 could be applied consistently with § 6 because the perfected rights in Imperial Valley were owned by and would be adjudicated to the District, not to individual landowners, who were merely members of a class for whose benefit the water rights had been acquired and held in trust. Individual farmers, the Court of Appeals said, had no right under the law to a particular proportion of the District's water. Applying § 46 and denying water to excess lands not sold would merely require reallocation of the water among those eligible to receive it and would not reduce the water which the District was entitled to have delivered in accordance with its perfected rights.

We find this disposition of the § 6 defense to the application of the 1926 Act's acreage limitation to be unpersuasive. *Arizona* v. *California*, *supra*, at 584, recognized that "one of the most significant limitations" on the Secretary's power under the Project Act was the requirement that he satisfy present perfected rights, a matter of great significance to those who had reduced their water rights to beneficial use prior to 1929. Accordingly, in our initial decree, the perfected right protected by § 6 was defined with some care: a right that had been acquired in accordance with state law and that had been exercised by the actual diversion of a specific quantity of water

and its application to a defined area of land.[20] In our supplemental decree, entered prior to the opinion of the Court of Appeals denying rehearing and rehearing en banc, there was decreed to the District a present perfected water right of 2.6 million acre-feet of diversions from the mainstream or the quantity of water necessary to supply the consumptive use required to irrigate 424,145 acres and related uses, whichever was less, with a priority date of 1901. 439 U. S., at 429. We thus determined that, as of 1929, the District had perfected its rights under state law to divert the specified amount of water and had actually diverted that water to irrigate the defined quantity and area of land. As we see it, the Court of Appeals failed to take adequate account of § 6 of the Project Act and its implementation in our opinion and decrees filed in the *Arizona* v. *California* litigation.

In the first place, it bears emphasizing that the § 6 perfected right is a water right originating under state law. In *Arizona* v. *California*, we held that the Project Act vested in the Secretary the power to contract for project water deliveries independent of the direction of § 8 of the Reclamation Act to proceed in accordance with state law and of the admonition of § 18 of the Project Act not to interfere with state law. 373 U. S., at 586–588.[21] We nevertheless clearly recognized that § 6 of the Project Act, requiring satisfaction of present perfected rights, was an unavoidable limitation on the Secretary's power and that in providing for these rights the Secretary

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[20] This was the Special Master's recommended definition. We accepted it over the objection of California. In requiring actual diversion of water and its application to a defined area of land, the definition did not reach all appropriative water rights under state law. See Report of Special Master, *Arizona* v. *California*, O. T. 1960, No. 8 Orig., pp. 307–309 (hereinafter Special Master Report).

[21] In terms of reclamation law generally, the import of the Court's opinion in this respect was considerably narrowed in *California* v. *United States*, 438 U. S. 645 (1978), but the latter case did not question the description of the Secretary's power under the Project Act itself.

must take account of state law. In this respect, state law was not displaced by the Project Act and must be consulted in determining the content and characteristics of the water right that was adjudicated to the District by our decree.[22]

It may be true, as the Court of Appeals said, that no individual farm in the District has a permanent right to any specific proportion of the water held in trust by the District. But there is no doubt that prior to 1929 the District, in exercising its rights as trustee, delivered water to individual farmer beneficiaries without regard to the amount of land under single ownership. It has been doing so ever since. There is no suggestion, by the Court of Appeals or otherwise, that as a matter of state law and absent the interposition of some federal duty, the District did not have the right and privilege to exercise and use its water right in this manner. Nor has it been suggested that the District, absent some duty or disability imposed by federal law, could have rightfully denied water to individual farmers owning more than 160 acres. Indeed, as a matter of state law, not only did the District's water right entitle it to deliver water to the farms in the District regardless of size, but also the right was equitably owned by the beneficiaries to whom the District was obligated to deliver water.[23]

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[22] While the source of present perfected rights is to be found in state law, the question of whether rights provided by state law amount to present perfected rights within the meaning of § 6 is obviously one of federal law. See *Ivanhoe Irrig. Dist.* v. *McCracken, supra,* at 289; *California* v. *United States, supra,* at 668–669, n. 21, 671–673, 678, n. 31.

[23] *Ivanhoe Irrig. Dist.* v. *All Parties and Persons,* 47 Cal. 2d 597, 624–625, 306 P. 2d 824, 840 (1957), rev'd *sub nom. Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U. S. 275 (1958). As beneficiaries of the trust, the landowners have a legally enforceable right, appurtenant to their lands, to continued service by the District. *Erwin* v. *Gage Canal Co.,* 226 Cal. App. 2d 189, 194–195, 37 Cal. Rptr. 901, 903–904 (1964); *South Pasadena* v. *Pasadena Land & Water Co.,* 152 Cal. 579, 588, 93 P. 490, 494 (1908). The District is obligated not only to continue delivery, but also to apportion water distributed for irrigation purposes ratably to each landowner in

These were important characteristics of the District's water right as of the effective date of the Project Act, and the question is whether Congress intended to effect serious changes in the nature of the water right by doing away with the District's privilege and duty to service farms regardless of their size. We are quite sure that Congress did not so intend and that to hold otherwise is to misunderstand the Project Act and the substantive meaning of "present perfected rights" as defined by this Court's decree.

The Court of Appeals said it would not be a breach of trust by a water district to obey the dictates of § 46, relying on *Ivanhoe Irrig. Dist.* v. *All Parties and Persons*, 53 Cal. 2d 692, 712, 350 P. 2d 69, 81 (1960). But the issue here is whether § 46 applies to lands already being irrigated in 1929. In the *Ivanhoe* proceedings, the courts were not dealing with perfected rights to water that the project there involved would furnish, nor with a Project Act that specifically required present perfected rights to be satisfied. Here, we are dealing with perfected rights protected by the Project Act; and because its water rights are to be interpreted in the light of state law, the District should now be as free of land limitations with respect to the land it was irrigating in 1929 as it was

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accordance with his share of the total assessments in the District. Cal. Water Code Ann. § 22250 (West 1956).

In the *Ivanhoe* litigation, the California Supreme Court originally determined that to deny water to farms in excess of 160 acres in single ownership would contravene § 22250, and would work a denial of due process and equal protection of the laws. Following this Court's decision that the 160-acre limitations contained in irrigation contracts for the Central Valley Project were mandated by federal reclamation law, the California Supreme Court, on remand, held that in light of this Court's opinion, water could be denied to farms exceeding the acreage limitation without violating state law. *Ivanhoe Irrig. Dist.* v. *All Parties and Persons*, 53 Cal. 2d 692, 350 P. 2d 69 (1960). However, the court's decision made clear that absent an overriding provision of federal law imposing an acreage limitation, state law debars an irrigation district from denying water to farms on the basis of size.

prior to the passage of the Project Act. To apply § 46 would go far toward emasculating the substance, under state law, of the water right decreed to the District, as well as substantially limiting its duties to, and the rights of, the farmer-beneficiaries in the District.[24]

It should also be recalled that we defined a present perfected right as one that had not only been acquired pursuant to state law but as one that had also been exercised by the diversion of water and its actual application to a specific area of land. We did not intend to decree a water right to the District under this definition, conditioned upon proof of actual diversion and use, but nevertheless to require the District to terminate service to the lands on the basis of which the right was decreed. The District has itself no power to require that excess lands be sold, and it is a contradiction in terms to say, as the Court of Appeals did, that the District has present perfected rights but that § 46 requires it to terminate deliveries to all persons with excess lands who refuse to sell.[25] We consequently hold that the perfected water right decreed to the District may be exercised by it without regard to the

[24] In *Ivanhoe Irrig. Dist.* v. *McCracken, supra,* at 292, the Court remarked that where a particular project has been exempted from the acreage limitation because of its peculiar circumstances, "the Congress has always made such exemption by express enactment." As we have explained, we have little trouble in concluding that the Project Act's provision for the satisfaction of perfected rights acquired under state law is an effective expression that the acreage limitation would be inapplicable to the lands served under such rights. As the Special Master observed in *Arizona* v. *California,* "the congressional intention was to insure that persons actually applying water to beneficial use would not have their uses disturbed by the erection of the dam and the storage of water in the reservoir." Special Master Report 309.

[25] Indeed, the Department of the Interior observed in 1946 that the administrative practice under § 46 had usually been "to refuse to deliver water to any lands, excess or nonexcess, until the owner of excess land has executed the recordable contract agreeing to dispose of the excess." Department of Interior, Landownership Survey on Federal Reclamation Projects 47 (1946).

land limitation provisions of § 46 of the 1926 Act or to any similar provisions of the reclamation laws.[26]

IV

The legislative history of the Project Act, which spans several years, raises no doubt in our minds about the foregoing construction of the Act.[27] Our attention has been called to nothing in the relevant materials indicating that although Congress was careful to preserve present perfected rights in § 6, other provisions of the Project Act were nevertheless intended to invoke acreage limitation with respect to lands already being irrigated in Imperial Valley by means of water diverted from the Colorado River and delivered to the Valley by the District's own works. Indeed, the version of the Project Act passed in the House contained an express acreage limitation applicable to all privately owned lands; but the Senate substituted the provisions of its own bill, which did not contain an acreage limitation expressly applicable to lands then being irrigated, and it was this version which became the Project Act despite objections in the Senate that the bill should be amended to limit water deliveries to 160 acres under single ownership. There is nothing in this chain of events to suggest that Congress intended § 14, by bringing the 1926 Act into play, to interfere with the delivery of water to those lands already under irrigation in Imperial Valley and having present perfected rights that the Secretary was bound to

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[26] The United States urges that § 6 merely specifies priorities among those entitled to water from the Project and is irrelevant in determining entitlement itself. The argument has no merit.

[27] The Project Act was the result of the fourth attempt by Congressman Swing and Senator Johnson of California to cause the Federal Government to move forward with such an undertaking. Their first bills were introduced in 1922, in the 67th Congress. The fourth set of bills, which were successful, were introduced in 1927, in the 70th Congress. Congressional action was completed on December 18, 1928, and the President's signature followed on December 21 of that year.

recognize.[28] If anything, the inference from the legislative history is to the contrary. This is not to say that we rely strongly on legislative materials in construing the Project

[28] Respondents point out that although the District was to repay the cost of the All-American Canal and the Imperial Dam, the repayment obligation carried no interest. We should not hold, it is urged, that Congress intended this permanent subsidy to large landholders. Rather, we should find that the benefits of the Project to the District justify the application of § 46 and the requirement that excess landholdings be sold. We think, however, that Congress struck the balance between public and private rights and determined to respect those rights to Colorado River water that had been put to use as of 1929. The Project Act recited its purposes as "controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States. . . ." Section 1 of the Act, 45 Stat. 1057, 43 U. S. C. § 617. The 1932 contract between the District and the United States contained nearly identical recitals as to the purposes of the Project. It also recited that there were public lands already within the District and required that substantial additional acreages of public and private lands be included within the District. The District Court found that certain national interests were advanced by the Project:

"1) The inclusion within the District by annexation, pursuant to Article 34 of the contract between the Government and the District dated December 1, 1932, of some 250,000 acres of Government lands.

"2) Added capacity in the Canal for the servicing of such lands and some 11,000 acres of Indian land.

"3) Flood control for the purpose of preserving the Laguna Dam and protecting the Yuma Reclamation Project as well as protecting the public lands and private interests in Imperial Valley.

"4) The control of silt because of the federal government's problem in handling silt in the Yuma Project.

"5) The need to build a canal on All-American soil to put the United States in a position to bargain with the Mexican Government over the use of the water of the Colorado River.

"6) It enabled the United States Government to reclaim and put to use large tracts of public and Indian lands of the United States in Coachella Valley." 322 F. Supp., at 19.

The District Court concluded that Congress was aware of the water rights held in Imperial Valley and determined to exempt them from the acreage limitations "in recognition of the fact that the All-American Canal Project

Act. Statements by the opponents of a bill and failure to enact suggested amendments, although they have some weight, are not the most reliable indications of congressional intention. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 204, n. 24 (1976); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381–382, n. 11 (1969). But we do say that the respondents have not called our attention to anything in the hearings, Committee Reports or floor debates suggesting in any substantial way that our construction of the Project Act is in error.

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was not merely an arid lands reclamation project, but was a special purpose program designed for national purposes, including water negotiations with Mexico, as well as for regional agricultural development." *Id.*, at 22.

The Senate Report on S. 728, S. Rep. No. 592, 70th Cong., 1st Sess. (1928), stated several purposes of the Project, one of which was that it would "end an intolerable situation, under which the Imperial Valley now secures its sole water supply from a canal running for many miles through Mexico, as well as make possible the reclamation of public lands lying around the rim of the present cultivated section of the valley." *Id.*, at 8. The Report also stated as follows:

"The all-American canal will carry a portion of the conserved waters to where they can be used for irrigation and domestic purposes. Looked at in a somewhat narrow way, it represents a cooperative enterprise between Imperial irrigation district, which serves the present irrigated area in Imperial Valley, the Coachella County water district, a public district embracing in its limits the Coachella Valley, and the United States as owner of approximately 200,000 acres of public land about the rim of Imperial Valley, and about 11,000 acres of Indian lands now without water but possessing the same possibilities of development with water as the fertile lands in the valley. Neither Imperial irrigation district, the Coachella district, nor the United States could afford alone to build a canal from the river. Acting in conjunction, the canal is entirely feasible." *Id.*, at 21.

The House Report on H. R. 5773, H. R. Rep. No. 918, 70th Cong., 1st Sess., 6 (1928), also identified one of the purposes of the Project as ending the "intolerable situation" which existed in Imperial Valley:

"This valley now secures its sole water supply by a canal which runs for some 60 miles through Mexico. The all-American canal will furnish a substitute for this and at the same time carry the water at an elevation sufficient to make possible, at some future date, the irrigation of additional land, mostly public, lying about the rim of the cultivated area."

There can be little question that the contemporary construction of the Project Act by the parties to the 1932 contract was that the acreage limitation did not apply to lands in the District presently being irrigated. Secretary Wilbur, in his letter of February 24, 1933, stated that early in the negotiations on the All-American Canal contract, the question was raised as to the 160-acre limitation, and the view was reached that the limitation did not apply to lands that were under cultivation and having a present water right.[29] There is no reason to doubt that the parties went forward on this basis, especially since language in early drafts of the contract which might have indicated an acreage limitation was eliminated in the course of the negotiations. The Imperial Valley system was a going concern at the time, and the Alamo Canal continued to supply the water to the Valley for another 10 years. It is thus a fair inference that both the Imperial Valley landowners and the United States proceeded on the assumption that the 160-acre limit was of no concern to those who were receiving water from the Alamo Canal. This contemporaneous view of the Project Act, which supports our own construction of the legislation, was not officially repudiated by the Secretary until 1964. It is also a matter of unquestioned fact that in the ensuing years the Secretary has delivered water to the District pursuant to its contract and that the 160-acre

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[29] The matter had been called to the Secretary's attention by a memorandum of February 7 from Porter W. Dent, the Assistant Commissioner and General Counsel of the Bureau of Reclamation. His memorandum contained almost identical language to that in the Secretary's later letter. Mr. Dent said:

"Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this proposed canal. So far as I am advised, all who have given this matter consideration agree that this limitation does not apply to lands now cultivated and having a present water right. The view has been, and is, I believe, that these lands having already a water right, are entitled to have such right recognized without regard to the acreage limitation mentioned." App. 220a.

provision of the reclamation laws has to this date never been an operative limitation with respect to lands under irrigation in 1929.[30]

V

There remains a further consideration. The parties stipulated and the District Court found that at the outset of this litigation, the District was irrigating approximately 14,000 more acres than the 424,145 acres under irrigation in 1929. If, in light of our perfected rights holding, an Art. III case or controversy remains with respect to the applicability of

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[30] This was the case despite the fact that in 1945 in the course of concluding that the lands in Coachella Valley were subject to the acreage limitation, the Department's Solicitor also took exception to the Wilbur view with respect to Imperial Valley. The Solicitor's opinion, however, totally ignored the existence of present perfected rights in Imperial Valley and their absence in Coachella. His view as to Imperial Valley did not prevail, in any event, for in 1948, Secretary Krug expressly declined to depart from the Department's consistent adherence to the Wilbur view that the Project Act did not require limiting water deliveries in Imperial Valley to 160 acres under single ownership. Furthermore, in 1952, when the District and the Department negotiated a revision of the 1932 contract in some respects, there was no effort made by the Department to insist on a limitation provision.

The Department's repudiation of its prior position in 1964 was based on its Solicitor's view that § 46 of the 1926 Act applied to Imperial Valley by virtue of § 14 of the Project Act and that under that section no farmer in Imperial Valley could have project water for more than 160 acres of land. Excess lands must either be sold or the District must deny water to them. The Solicitor's opinion, however, gave only cursory attention to § 6. After stating that the proper rule of construction in cases such as he was considering was that "rights, privileges and immunities not expressly granted are reserved," the opinion went on to conclude:

"For the same reason the requirement in section 6 for 'satisfaction of present perfected rights' cannot be read as insulating the District lands from acreage limitation. It is not in plain terms an exemption from the limitations of reclamation law in connection with the obligation to repay the cost of Imperial Dam and the All-American Canal." 71 I. D., at 511.

We agree with the District Court's conclusion that this is a totally inadequate conception of perfected rights.

acreage limitations to this additional 14,000 acres, there would remain to be disposed of those arguments of petitioners for reversing the Court of Appeals which we have not addressed and which, if sustained, would exempt from acreage limitations all privately owned lands in Imperial Valley, a result which the District Court seemingly embraced.[31] The parties, however, have not separately addressed the status of this additional 14,000 acres; nor does the record invite us to deal further with this case without additional proceedings in the lower court. We do not know, for example, whether the District is still irrigating the additional 14,000 acres, whether any of the 14,000 acres consists of lands held in excess of 160 acres, or whether for some other reason of fact or law there is not now a controversy that requires further adjudication. Even if a live dispute remains, it would be helpful to have the Court of Appeals, or the District Court in the first instance if the Court of Appeals deems it advisable, adjudicate the status of the 14,000 acres, freed of any misapprehensions about the applicability of the 160-acre limitation to lands under irrigation in 1929.

Accordingly, the judgment of the Court of Appeals is reversed with respect to those lands that were irrigated on June 25, 1929, and with respect to which the District has been

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[31] Petitioners contend that contrary to 28 U. S. C. § 1738, the Court of Appeals failed to give the same full faith and credit to the *Hewes* decision as that decision would have by law or usage in the courts of California. They urge that the United States embraced and consistently adhered to a construction of the Project Act that would exempt from acreage limitations all privately owned lands in the District, a position which the Government should not now be permitted to repudiate. They also argue that quite apart from § 6, the structure and other provisions of the Project Act negate the applicability of acreage limitations to privately owned lands in Imperial Valley. Finally, they present a view of the legislative history of the Project Act that they claim supports the inference that Congress intended to exempt from acreage limitations any and all lands that the District might subsequently take into itself and irrigate with project water.

adjudicated to have a perfected water right as of that date. The judgment is otherwise vacated, and the case is remanded to that court for further proceedings consistent with this opinion.[32]

So ordered.

[32] We note, further, that there has passed the Senate and is pending in the House a measure that would exempt lands in the District from the reach of acreage limitations in the reclamation law.

BIFULCO *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79–5010. Argued February 27, 1980—Decided June 16, 1980

Section 406 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Act) provides that "[a]ny person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy" (the "target offense"). Petitioner and others were convicted of violating § 406 by conspiring to violate § 401 (a)(1) of the Act by knowingly manufacturing, distributing, and possessing a controlled substance. In accordance with the provisions of § 401 (b)(1)(B) prescribing penalties for violations of § 401 (a)(1), petitioner was sentenced to a term of imprisonment, a fine, and a 5-year special parole term to be served upon completion of the term of imprisonment. The Court of Appeals affirmed petitioner's conviction, and thereafter he filed an action under 28 U. S. C. § 2255 to vacate his sentence, claiming that the sentence was unlawful because § 406 does not authorize the imposition of a special parole term. The District Court held that petitioner had been properly sentenced, and the Court of Appeals affirmed.

Held: Section 406 of the Act does not authorize the imposition of a special parole term even though that sanction is included within the penalty provision of the target offense. Pp. 387–401.

(a) A "plain meaning" interpretation of the term "imprisonment" in § 406 does not support the position that the term means a term of incarceration plus special parole made applicable by the target offense's penalty provisions. Moreover, the structure of the Act read as a whole supports the conclusion that § 406 defines the types of punishment authorized for conspirators—imprisonment, fine, or both—and sets maximum limits on those sanctions through reference to the penalty provisions of the target offense, but does not incorporate by reference any provisions for special parole. Pp. 388–390.

(b) Nor does the Act's legislative history demonstrate that Congress intended that the penalties authorized for substantive offenses, and those for conspiracies to commit them, were to be identical, thus authorizing

special parole terms for conspiracy convictions. Instead, the history supports the view that § 406 authorizes two types of sanctions—fines and imprisonment—and fixes the maximum amount of each that may be imposed by reference to the target offense's penalty provisions. Pp. 391–398.

(c) A reading of § 406 to include the special parole provisions of target offenses cannot be supported on the ground that Congress' principal objective in enacting the Act's penalty provisions—to deter professional criminals from engaging in drug trafficking for profit—renders it unreasonable to ascribe to Congress the intent to authorize special parole for isolated substantive offenses while withholding this sentencing tool for conspiracies. A comparison of those drug offenses for which Congress clearly authorized special parole terms with those for which it clearly did not, does not reveal a coherent pattern based on the asserted justification for escalated sanctions. Moreover, since § 406 deals with both conspiracies and attempts, and prescribes an identical range of punishment for both, it is not surprising that Congress would provide for less stringent sanctions to be imposed for violations of § 406 than for a completed substantive offense. Pp. 398–399.

600 F. 2d 407, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 401. STEVENS, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 402.

Steven Lloyd Barrett, by appointment of the Court, 444 U. S. 939, argued the cause for petitioner. With him on the briefs were *William E. Hellerstein* and *Phylis Skloot Bamberger*.

Harlon L. Dalton argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Frey*, and *John F. De Pue*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue presented in this case is whether § 406 of the Comprehensive Drug Abuse Prevention and Control Act of

1970 (Act), 84 Stat. 1265, 21 U. S. C. § 846,[1] authorizes a sentencing court to impose a term of special parole upon a defendant who is convicted of conspiracy to manufacture or distribute a controlled substance.

I

Section 406 provides:

> "Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The object of the conspiracy at issue in this case was the commission of the substantive offense defined in § 401 (a) of the Act, 21 U. S. C. § 841 (a). That subsection reads:

> "Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
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> "(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> "(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

The penalties for violations of § 401 (a) are set forth in § 401 (b). That subsection authorizes the imposition of terms of imprisonment, fines, and, in some instances, mandatory minimum terms of special parole. The range of permissible punishments varies depending on the nature of the controlled substance involved, and on whether the defendant has been convicted previously of a drug offense. The penalty provision at issue is § 401 (b)(1)(B).[2] It states:

> "Except as otherwise provided in section 405 [which

[1] The Act, Pub. L. 91-513, is set forth at 84 Stat. 1236-1296. For the sake of simplicity, further otherwise appropriate citations to the Statutes at Large will be omitted.

[2] This provision was amended in 1978, but the amendment is not perti-

deals with distribution to minors], any person who violates subsection (a) of this section shall be sentenced as follows:

. . . . .

"In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine or not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment."

Section 401 (c) describes the operation of the special parole term provisions in greater detail. It states:

"A special parole term imposed under this section or section 405 may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole

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nent to the issue presented here. See Pub. L. 95-633, § 201, 92 Stat. 3774, 21 U. S. C. § 841 (b)(1)(B) (1976 ed., Supp. II).

term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 shall be in addition to, and not in lieu of, any other parole provided for by law."

The narrow, but important, question presented in this case is whether § 406, which states the penalty for conspiracy as "imprisonment or fine or both," but limits maximum punishment by reference to the penalty provisions of the substantive target offense, authorizes the imposition of a special parole term where that sanction is included within the penalty provisions of the target offense.

II

In an indictment filed in December 1976 with the United States District Court for the Eastern District of New York, petitioner Alphonse Bifulco and others were charged with a single count of conspiring to violate § 401 (a)(1) by knowingly and intentionally manufacturing, distributing, and possessing substantial quantities of phencyclidine, a schedule III controlled substance. This conspiracy was charged as a violation of § 406. A jury found petitioner and several codefendants guilty of the offense charged, and petitioner was sentenced to a 4-year term of imprisonment, a fine of $1,000, and a 5-year special parole term.[3] The United States Court of Appeals for the Second Circuit subsequently affirmed petitioner's conviction in an unpublished order.

In January 1979, petitioner, pursuant to 28 U. S. C. § 2255, filed *pro se* a motion to vacate his sentence. He claimed that

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[3] The Court of Appeals stated that petitioner was charged with two substantive violations of § 401 (a)(1), in addition to the conspiracy count, and that he was acquitted of the substantive charges. 600 F. 2d 407, 408 (CA2 1979). The parties agree, however, that this is error and that petitioner was charged with, and convicted on, a single conspiracy count. Brief for Petitioner 4, n. 2; Brief for United States 4, n. 2.

the sentence was unlawful because § 406 does not authorize the imposition of a special parole term to be served upon completion of a term of imprisonment. The District Court held that petitioner had been properly sentenced, and dismissed his complaint. App. 7.

On appeal, the Second Circuit affirmed. 600 F. 2d 407 (1979). In a *per curiam* opinion, that court followed two other Courts of Appeals that had held that § 406 authorizes the imposition of a special parole term. See *United States* v. *Burman*, 584 F. 2d 1354, 1356–1358 (CA4 1978), cert. denied, 439 U. S. 1118 (1979), and *United States* v. *Jacobson*, 578 F. 2d 863, 867–868 (CA10), cert. denied, 439 U. S. 932 (1978). It also relied on the decision in *United States* v. *Dankert*, 507 F. 2d 190 (CA5 1975), which reached a similar result with respect to the closely analogous sentencing provisions of § 1013 of the Act, 21 U. S. C. § 963 (proscribing any conspiracy to import a controlled substance).

Shortly after the Second Circuit's decision in this case, the United States Court of Appeals for the Third Circuit reached the opposite conclusion on the issue and held that a special parole term may not be imposed under § 406. *United States* v. *Mearns*, 599 F. 2d 1296 (1979), aff'g 461 F. Supp. 641 (Del. 1978), cert. pending, No. 79–415. We granted certiorari, 444 U. S. 897 (1979), to resolve this conflict among the Courts of Appeals.[4]

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[4] Two Courts of Appeals, in addition to those followed by the Second Circuit in this case, have joined in the conclusion that § 406 authorizes the imposition of a special parole term where such a term is included in the penalty provisions of the target offense. See *United States* v. *Sellers*, 603 F. 2d 53, 58 (CA8 1979), and *Cantu* v. *United States*, 598 F. 2d 471, 472 (CA5 1979). In addition, in a number of cases appellate courts have affirmed the convictions of defendants sentenced to special parole terms under § 406 without considering the question whether special parole was authorized. For example, the question presented here may have lingered beneath the surface in *United States* v. *Timmreck*, 441 U. S. 780 (1979).

In *Mearns*, the Third Circuit followed the lead of two District Court opinions (in addition to the opinion there under review) holding that special

III

The Government recognizes, Brief for United States 31, n. 26, that our examination of the meaning of § 406 must be informed by the policy that the Court has expressed as "the rule of lenity." In past cases the Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. See, *e. g.*, *United States* v. *Batchelder*, 442 U. S. 114, 121 (1979); *Simpson* v. *United States*, 435 U. S. 6, 14–15 (1978). The Court's opinion in *Ladner* v. *United States*, 358 U. S. 169, 178 (1958), states the rule: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." See *Whalen* v. *United States*, 445 U. S. 684, 695, n. 10 (1980); *Simpson* v. *United States*, 435 U. S., at 15.

The Court has emphasized that the "touchstone" of the rule of lenity "is statutory ambiguity." See, *e. g.*, *Lewis* v. *United States*, 445 U. S. 55, 65 (1980). Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent. The Government argues here that there can be no uncertainty about Congress' intent to authorize a special parole term as a penalty for a conspiracy offense, whenever that penalty is authorized for the offense that was the target of the conspiracy. In advancing this argument, it focuses on the language and structure, legislative history, and motivating policies of the Act. We examine these three factors in turn.

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parole is not a penalty authorized by § 406. See *United States* v. *Jacquinto*, 464 F. Supp. 728 (ED Pa. 1979), and *Fassette* v. *United States*, 444 F. Supp. 1245 (CD Cal. 1978). Cf. *United States* v. *Wells*, 470 F. Supp. 216 (SD Iowa 1979) (adopting the *Mearns* rationale in sentencing, pursuant to 18 U. S. C. § 3, accessories after the fact to a drug conspiracy).

A

Language and structure of the Act. Several reviewing courts have adopted the view that the special parole term specified in § 401 (b)(1)(B) is necessarily included within the "term of imprisonment" to which it is appended. See, *e. g.*, *United States* v. *Jacobson*, 578 F. 2d, at 868. Thus, when Congress stated in § 406 that a person guilty of attempt or conspiracy "is punishable by imprisonment," it meant to include within the term "imprisonment" any special parole term made applicable by the penalty provisions of the substantive offense. This argument is not too persuasive, however, because special parole is not authorized for all substantive offenses to which § 406 refers. Therefore, "imprisonment" within the meaning of § 406 does not always include special parole. As a period of supervision served upon completion of a prison term, special parole is also functionally distinct from incarceration. Finally, the penalty provisions of those substantive offenses that authorize special parole terms reflect this functional dichotomy. Section 401 (b)(1)(B), for example, twice provides that a special parole term of years is to be imposed *"in addition to* such term of imprisonment." (Emphasis added.) We agree, therefore, with the conclusion of those courts that have rejected the argument that "imprisonment" in § 406 plainly means a term of incarceration plus special parole. See. *e. g.*, *United States* v. *Jacquinto*, 464 F. Supp. 728, 729–730 (ED Pa. 1979).

Faced with these obstacles, the Government cannot rely solely on a "plain meaning" interpretation of the term "imprisonment." Thus, in its principal argument, the Government asks this Court to take a broader view of the relationship between § 406 and the penalty provisions for substantive offenses and to conclude that the structure of the Act, viewed as a whole, creates an inference that § 406 incorporates by reference those substantive penalty provisions. The Government contends that the language of the statute supports this

reading because § 406 authorizes penalties "which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." While this argument is not wholly without force, it ignores the immediately preceding words of § 406, which state that "[a]ny person who attempts or conspires to commit any offense defined in this title is punishable *by imprisonment or fine or both.*" (Emphasis added.) [5] Petitioner argues that § 406 defines the types of punishment authorized for conspirators—imprisonment, fine, or both—and sets maximum limits on those sanctions through reference to the penalty provisions of the target offense. Petitioner's reading of the language of § 406, and the sentencing scheme that it proposes, is no less plausible than the Government's. Moreover, it is petitioner's reading that finds further support in the structure of the Act read as a whole.

Section 406 is not the only provision of the Act that defines sentences by reference to the penalty provisions of other offenses. Section 405 (a) of the Act, 21 U. S. C. § 845 (a), which enhances punishment for one convicted of distributing a controlled substance to a minor, provides:

> "Any person at least eighteen years of age who violates section 401 (a)(1) by distributing a controlled substance to a person under twenty-one years of age is . . . punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by section 401 (b), *and (2) at least twice any special parole term authorized by section 401 (b)*, for a first offense involving the same controlled substance and schedule." (Emphasis supplied.) [6]

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[5] The dissent's "ordinary reading of § 406," *post*, at 402, appears to be based on this same incomplete reading of the words of the conspiracy provision.

[6] Section 405 (b) likewise provides for treble enhancement of the fine, the term of imprisonment, *and the minimum length of any special parole term*, for one who is convicted a second or subsequent time for distributing a controlled substance to a minor.

At the least, Congress' separate enumeration of intended penalties in § 405 confirms its design to adhere to the functional distinction between "imprisonment, or a fine, or both" and the unique and novel concept of special parole. That no reference is made to special parole in § 406 thus supports petitioner's view that Congress did not intend it to constitute an element of the sentence imposed upon one convicted of conspiracy or attempt.[7]

Further proof that Congress intended special parole to be imposed only for certain substantive offenses defined in § 401 and § 405, and not for other offenses under the Act, is found in § 401 (c), which defines the workings of special parole. That subsection states: "A special parole term *imposed under this section or section 405* may be revoked if its terms and conditions are violated." (Emphasis supplied.) One convicted and sentenced for conspiracy under § 406 cannot be said to have had his sentence "imposed under" § 401 or § 405.[8]

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[7] The Government argues that the express reference to special parole in § 405 does not detract from the view that § 406 incorporates special parole by implication. It contends that it was necessary for Congress to deal with special parole explicitly in § 405 because it chose to mandate a minimum special parole term of *at least* twice the length of the term authorized under § 401 (b), whereas § 405 imposes a fine or imprisonment of *up to* twice that otherwise authorized. The Government's argument does not dispel the fact, however, that Congress specifically accommodated the concept of special parole in one general provision imposing sentence by reference to other offenses, but did not do so with respect to an adjacent provision, § 406.

[8] The Government would explain the specificity of § 401 (c) as an instance where the drafters of that provision "simply looked to see what sections of the proposed bill used the term special parole, and inserted those section numbers into [the forerunner of § 401 (c)]." Brief for United States 26–27, n. 22. It argues, of course, that although § 406 did not refer to special parole in so many words, it did incorporate the sentencing provisions of § 401. We reject the Government's argument for reasons stated in the text. Moreover, its "explanation" assumes a carelessness in draftsmanship that probably is unwarranted; see the following subparts B and C.

B

Legislative history. Conceding that Congress' draftsmanship when it enacted § 406 may have been less than "explicit," Brief for United States 17, and n. 10, the Government asks this Court to look beyond the ambiguous language of the statute, and to give its words "their fair meaning in accord with the manifest intent of the lawmakers." *United States* v. *Brown*, 333 U. S. 18, 26 (1948). The Government argues that the legislative history of the Act demonstrates that Congress intended that the penalties authorized for substantive offenses, and those for conspiracies to commit them, were to be identical.

It is true that prior to the Act federal narcotics legislation provided for a congruence between sentences authorized for substantive violations and sentences authorized for conspiracies.[9] A similar congruence was a feature of the several bills introduced in Congress in 1969 that were the forerunners of the Act. But a special parole term, a sanction previously unknown in the administration of our system of criminal justice, was not authorized as a penalty for any offense in those initial proposals.[10]

The special parole concept first was presented to Congress by John Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs, in testimony before a Senate Subcommittee

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[9] See 21 U. S. C. §§ 174, 176a, 176b (1964 ed.); and 26 U. S. C. §§ 7237 (a) and (b) (1964 ed.).

[10] See S. 1895, 91st Cong., 1st Sess., §§ 701–708 (1969), and S. 2637, 91st Cong., 1st Sess., §§ 501–508 (1969), reprinted in Narcotics Legislation: Hearings on S. 1895 et al. before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 69–77, 160–170 (1969). See also H. R. 13743 and H. R. 14774, 91st Cong., 1st Sess., §§ 501–508 (1969), reprinted in Part 1, Drug Abuse Control Amendments—1970: Hearings on H. R. 11701 and H. R. 13743 before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., 17–20 (1970).

on October 20, 1969. See Narcotics Legislation: Hearings on S. 1895 et al. before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 663, 676 (1969). The Attorney General earlier had sought Subcommittee approval for further input from the Justice Department on the penalty structures in the pending legislation, *id.*, at 255, and Mr. Ingersoll presented several alternative penalty schemes for the Subcommittee's consideration.[11] His comments to the Subcommittee concerning the special parole provisions were, in their entirety, as follows:

> "Another requirement that has been included in the alternative penalty schemes is a special parole term that is a part of the illicit trafficking sentence structure. Just as incarceration is not always a meaningful answer to effective rehabilitation, certainly incarceration without an adequate supervisory followup after release is not in the best interest of society.
>
> "Therefore, we have required a special parole term so that persons sentenced for trafficking violations would be placed under supervision for a period of time regardless of whether they are incarcerated or their sentence probated or suspended. The intent here is to give the judges another tool for sentencing and another means of protecting society when dealing with the drug violator." *Id.*, at 676.

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[11] A chart setting out the alternative penalty schemes proposed by the Justice Department is included in the record of hearings held before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce. *Id.*, at 90–92. This chart describes the penalty provisions favored by the Department for attempt and conspiracy as providing "that any person who attempts or conspires to commit any offense under the Act may be punished by imprisonment and/or fine, which may not exceed the maximum punishment proscribed for committing the offense." *Id.*, at 92. No mention is made of special parole terms in the conspiracy context. It seems, therefore, that the inexact draftsmanship that the Government would find in the legislative history of § 406 is not to be attributed solely to Congress.

Mr. Ingersoll did not specify whether special parole terms were to be authorized for conspiracies to commit trafficking offenses, see n. 11, *supra*, and the bill that eventually was approved by the full Senate Committee on the Judiciary was no less ambiguous. See S. Rep. No. 91–613, pp. 116–118 (1969). That bill, S. 3246 91st Cong., 2d Sess. (1970), in its §§ 501 (c)(1) and (2), mandated the imposition of a special parole term whenever a prison sentence was imposed under the forerunners to §§ 401 (b)(1)(A) and (B).[12] But § 504 of the bill, the forerunner to § 406, included no reference to special parole.[13]

The Judiciary Committee's section-by-section analysis of S. 3246 noted that special parole terms were to be imposed for certain substantive offenses, S. Rep. No. 91–613, at 25, but with respect to the "endeavor and conspiracy" provision stated only: "Section 504 provides that any person who endeavors or conspires to commit any offense defined in this title may be punished by imprisonment and/or a fine, which may not exceed the maximum punishment prescribed for the offense." *Id.*, at 26. The Government argues that the Subcommittee meant to include a specific reference to special parole in § 504 when it amended the substantive offense sections in response to Mr. Ingersoll's testimony. For unexplained reasons, however, the Subcommittee neglected to make the conforming

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[12] The forerunner to § 401 (b)(1)(B) was § 501 (c)(2) of S. 3246. It provided an identical penalty scheme for first offenders as does the current substantive offense—a term of imprisonment of not more than five years, a fine of not more than $15,000, or both, and a 2-year minimum special parole term in addition to any term of imprisonment. See S. Rep. No. 91–613, at 116.

[13] Section 504 of S. 3246, which differed from § 406 only in its use of the term "endeavor" rather than "attempt," provided:

"Any person who endeavors or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the endeavor or conspiracy." S. Rep. No. 91–613, at 118.

change in the conspiracy section. Brief for United States 22. The wording of the Judiciary Committee's section-by-section analysis, however, would seem to indicate its awareness that § 504, unlike the subsections of § 501 that had been amended to incorporate the concept of special parole, authorized punishments consisting only of "imprisonment and/or a fine."

Further support for the view that the Judiciary Committee knew what it was doing when it approved § 504 of S. 3246 may be found in those provisions of the bill that dealt with a second or subsequent offense. Under the Act, doubly enhanced penalties for second offenders are included within the provisions defining the sentences for individual substantive offenses. See, *e. g.*, § 401 (b)(1)(B), quoted *supra*, at 383–384. S. 3246, however, contained a separate provision, § 508 (a), that set out the penalties for repeat offenders. It stated:

> "Any person convicted of any offense under this Act is, if the offense is a second or subsequent offense, punishable by a term of imprisonment twice that authorized, by twice the fine otherwise authorized, or by both. If the conviction is for an offense punishable under subsection 501 (c)(1) or subsection 501 (c)(2) of this Act [the forerunners to §§ 401 (b)(1)(A) and (B)], and if it is the offender's second or subsequent offense, the court shall impose, in addition to any terms of imprisonment and fine, twice the special parole term otherwise authorized." S. Rep. No. 91–613, at 119–120.[14]

[14] An identical provision was contained in H. R. 17463, 91st Cong., 2d Sess., § 508 (a) (1970), a forerunner of the Act approved by one of the two House Committees to conduct hearings on the proposed narcotics legislation. See Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings on H. R. 17463 before the House Committee on Ways and Means, 91st Cong., 2d Sess., 69 (1970) (hereinafter Ways and Means Hearings). The bill eventually passed by the House, H. R. 18583, 91st Cong., 2d Sess. (1970), incorporated enhanced penalties for repeat offenders within the individual substantive offenses. See 116 Cong. Rec. 33625 (1970). The House bills are discussed further below.

We think this section of the Senate bill makes it fairly evident that the Committee recognized that it had provided for the imposition of special parole terms under various subsections of § 501, but that it had not done so generally.[15] Thus, § 508 (a) of S. 3246, like § 405 of the Act, reveals that Congress' failure explicitly to incorporate the concept of special parole into the Act's conspiracy provision, alleged by the Government to have been inadvertent, in fact may have been intentional.

The only reference made to the special parole provisions during the Senate debates on S. 3246 tends to confirm this conclusion. Senator Dodd, the Subcommittee chairman, summarized the sentencing provisions of §§ 501 (c)(1) and (2) as follows:

> "Those selling schedule I and II narcotics such as heroin and opium can draw a sentence of up to 12 years and a possible fine of $25,000. For schedules I, II, and III sales of non-narcotics such as marihuana, 'pep pills' and the like, the sentence is up to 5 years and a possible fine not exceeding $15,000. A [minimum] special parole term of from 2 to 3 years is required for each of the above offenses." 116 Cong. Rec. 996 (1970).

Senator Dodd did not mention the special parole concept in the context of any other sentencing provisions; § 504, the conspiracy provision of S. 3246, was not mentioned at all during the Senate debates.

Given the scant support in the legislative history of the Senate bill for the Government's position, it is not surprising that the Government must place greater reliance on events that transpired during the House's consideration of proposed narcotics legislation similar to S. 3246. H. R. 17463, the subject of hearings before the House Committee on Ways and

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[15] The Government makes the same argument with respect to the repeat offender provisions of S. 3246 and H. R. 17463 that it makes with respect to § 405, see n. 7, *supra*. The argument is no more persuasive here.

Means in July 1970, contained penalty provisions that were substantially identical to those in S. 3246. See H. R. 17463, 91st Cong., 2d Sess., §§ 501 (c)(1), (c)(2), and 504 (1970), reprinted in Ways and Means Hearings 61, 66.

Mr. Ingersoll appeared before the Committee on Ways and Means, testified as to the Department of Justice's firm support for H. R. 17463, and submitted a section-by-section analysis of the bill which highlighted the differences between its provisions and existing federal narcotics legislation. Ways and Means Hearings 210–211. That analysis described the operation of the special parole terms applicable to § 501 (c), and noted: "This special parole term is a new program, and there are no comparable laws now in force for narcotic drug law convictions." *Id.*, at 222. With respect to the bill's conspiracy provision, § 504, Mr. Ingersoll's section-by-section analysis stated:

> "This section provides that a person may be punished for endeavoring or conspiring to commit an offense under this Act. Upon conviction, his sentence may not exceed the punishment prescribed for the offense which was the object of the attempt or the conspiracy." *Id.*, at 223.

The Government would read the second sentence of this passage as explaining "that the sentencing scheme contemplated that conspiracy was to be punished to the same extent as object offenses, without exception." Brief for United States 24. But the Ingersoll statement, like the language enacted in § 406, explains merely that the punishment imposed for conspiracy may not exceed the punishment authorized for the pertinent target offense. It does not define the punishment authorized under the conspiracy provision to include special parole, and it does not disavow petitioner's theory that § 406 defines the types of punishment authorized for conspiracy, while the penalty provisions of the target offense set the maximum amounts of those types of punishment that properly may be imposed. Moreover, a chart sub-

mitted to the Committee by the Justice Department, and appended to Mr. Ingersoll's section-by-section analysis, specifically noted that H. R. 17463 authorized the imposition of special parole terms for certain substantive offenses. Ways and Means Hearings 229. With respect to the conspiracy section of the bill, however, the chart contained a footnote that merely reads: "H. R. 17463 provides that any person who endeavors or conspires to commit any offense under the act may be punished *by imprisonment and/or fine*, which may not exceed the maximum punishment proscribed [*sic*] for committing the offense." *Id.*, at 230, n. 6. (Emphasis supplied.) In sum, we find no persuasive support for the Government's argument in the report of the hearings before the House Committee on Ways and Means.

The hearings before the Committee on Ways and Means followed earlier hearings conducted by the House Committee on Interstate and Foreign Commerce. The latter Committee issued the House Report on H. R. 18583, 91st Cong., 2d Sess. (1970), which contained additions and revisions to H. R. 17463 not pertinent to the sentencing provisions at issue here. H. R. Rep. No. 91–1444, pt. 1 (1970). Like the Senate Report, the House Report appears plainly to recognize the distinction between the penalties for specific substantive offenses, authorizing special parole terms, and the conspiracy offense, authorizing only terms of imprisonment and fines. Thus, with respect to § 406 of H. R. 18583, the direct ancestor of the present § 406, the House Report's section-by-section analysis states:

> "Section 406 provides that any person who attempts or conspires to commit any offense defined in this title may be punished *by imprisonment and/or fine which may not exceed the maximum amount set for the offense*, the commission of which was the object of the attempt or conspiracy." H. R. Rep. No. 91–1444, at 50. (Emphasis supplied.)

The grammatical structure of this sentence lends obvious support to petitioner's theory that § 406 authorizes two types of sanctions—fines and imprisonment—and fixes the maximum amount of each that may be imposed by reference to the penalty provisions of the target offense.

In conclusion, we believe that, rather than supporting the Government's argument that Congress manifested an intention to authorize special parole terms for conspiracy convictions, the Act's legislative history supports the opposite view. In hearings, debates, and legislative reports, to the extent that Congress' attention was drawn to the matter, Members of both Houses explicitly recognized that the penalty provisions of some substantive offenses attached a mandatory minimum term of special parole to any term of imprisonment. On the other hand, every reference to one of the forerunners of § 406 stated that it authorized penalties consisting of imprisonment and/or fine, and failed to mention special parole.

C

Motivating policy. The Government strongly argues, finally, that Congress' principal objective in enacting the penalty provisions of the Act—to deter professional criminals from engaging in drug trafficking for profit—"render[s] it unreasonable to ascribe to [Congress] the intent to authorize special parole for isolated substantive offenses while withholding this major sentencing tool for conspiracy offenses." Brief for United States 28. This contention is unpersuasive for two reasons.

First, as petitioner points out, Brief for Petitioner 14–23; Reply Brief for Petitioner 1–3, a comparison of those drug offenses for which Congress clearly authorized the imposition of special parole terms with those for which it clearly did not, does not reveal a coherent pattern based on the asserted justification for escalated sanctions. For some of the most serious offenses, as measured by the length of the term of imprisonment and severity of the fine they authorize, special

parole is not included among the available sanctions. *E. g.*, § 408 of the Act, 21 U. S. C. § 848 (continuing criminal enterprise); § 403 of the Act, 21 U. S. C. § 843 (registrants); and the new § 401 (d) of this Act, 21 U. S. C. § 841 (d) (1976 ed., Supp. II) (piperidine offenses). Thus, the Government's argument based on Congress' sentencing objectives would prove too much.

Second, the thrust of the Government's argument is that the conspiracy to engage in drug trafficking presents at least as great a threat, if not a greater one, to the community as does an isolated act of distribution. In other contexts, we have recognized the logic of that view. See, *e. g.*, *Iannelli* v. *United States*, 420 U. S. 770, 778 (1975). From this premise, the Government contends that Congress must have desired the harsh sanctions incorporated within the concept of special parole—the unlimited maximum length of its term and the grave consequences attending its revocation, see § 401 (c)—to be available to the judge sentencing a drug conspirator.

What the Government does not mention, however, is that § 406 sets identical penalties for conspiracies and for attempts. Congress dealt with both these forms of inchoate crime in a single provision, and prescribed an identical range of punishment for a person convicted of participation in a major trafficking conspiracy, and for another person convicted of an unsuccessful attempt to manufacture or distribute a small amount of a controlled substance. When one focuses on the fact that § 406 penalizes attempts as well as conspiracies, it is not surprising that Congress would provide for less stringent sanctions to be imposed for violations of that provision than for a completed substantive offense. Indeed, as Mr. Ingersoll pointed out in his section-by-section analysis of H. R. 17463, prior to the passage of this Act an attempt to commit a substantive drug offense was not punishable at all under the federal narcotics laws. Ways and Means Hearings 223.[16]

[16] The dissent takes us to task for failing to recognize that it is unlikely that Congress would intend that "the directors of a narcotics distribution

IV

This investigation into the meaning of § 406, as informed by an examination of its language and structure, its history, and relevant policy considerations, yields the likely conclusion that Congress' failure specifically to authorize the imposition of special parole terms as punishment for those convicted of conspiracy was not a slip of the legislative pen, nor the result of inartful draftsmanship, but was a conscious and not irrational legislative choice. Our analysis reveals, at the least, a complete absence of an unambiguous legislative decision to authorize special parole terms as punishment for those convicted of drug conspiracies. Of course, to the extent that doubts remain, they must be resolved in accord with the rule of lenity.[17] If our construction of Congress' intent, as evi-

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business be punished less severely than their subordinates who merely peddle the poison." *Post*, at 402. But even a cursory reading of the Act should make it clear that our opinion today will not result in the sentencing disparity the dissent fears. Section 406's punishment provisions are not the sole sanctions Congress enacted for apprehended directors of organized drug trafficking operations. First, nothing prevents the Government from prosecuting the operators of a distribution network, either as principals or as aiders and abettors, for substantive manufacturing, distribution, and possession offenses, pursuant to § 401 of the Act, 21 U. S. C. § 841. Second, and more significantly, Congress enacted two special provisions with the directors of large trafficking operations particularly in mind. The sanctions available under those provisions are especially severe. See § 408 of the Act, 21 U. S. C. § 848 (continuing criminal enterprise); §§ 409 (e)(2) and (3) of the Act, 21 U. S. C. §§ 849 (e)(2) and (3) (defining a special drug offender).

[17] One might quarrel with our conclusion that Congress was aware of the distinction between the penalty provisions of § 401 (b)(1)(B) and § 406, and chose not to include special parole terms among the sanctions authorized for attempts and conspiracies. That it would be extremely difficult to accept the Government's argument that Congress *unambiguously intended* a contrary result, however, perhaps is best evidenced by the fact that the rule of lenity is not mentioned, let alone applied, in any of the lower court opinions that have accepted the Government's position. See cases cited in n. 4, *supra*, and accompanying text. The dissenting opinion would appear to fare little better on that score.

denced by the scant record it left behind, clashes with present legislative expectations, there is a simple remedy—the insertion of a brief appropriate phrase, by amendment, into the present language of § 406. But it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks in this case.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court with instructions to vacate the special parole term that was imposed upon petitioner.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

If the question presented by this case were as simple and easy as the dissent formulates it—whether "the directors of a narcotics distribution business [should] be punished less severely than their subordinates who merely peddle the poison"—none of us would have any difficulty with the decision. But that is not really the issue. Rather, the question before the Court is substantially more limited: What do the words of the statute mean? Of course, we must try to discern the intent of Congress. But we perform that task by beginning with the ordinary meaning of the language of the statute. Our compass is not to read a statute to reach what we perceive—or even what we think a reasonable person should perceive—is a "sensible result"; Congress must be taken at its word unless we are to assume the role of statute revisers. *Aaron* v. *SEC*, 446 U. S. 680 (1980); *TVA* v. *Hill*, 437 U. S. 153, 173 (1978).

Particularly in the administration of criminal justice, a badly drawn statute places strains on judges. See, *e. g.*, *Busic* v. *United States*, 446 U. S. 398 (1980); *LaRocca* v. *United States* (decided with *Busic*). The temptation to exceed our limited judicial role and do what we regard as the more sensible thing is great, but it takes us on a slippery

slope. Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done. The Spirit of Liberty: Papers and Addresses of Learned Hand 306–307 (Dilliard ed. 1960).

Not without the same reluctance that in my view underlies the Court's opinion, I join the opinion.

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, dissenting.

Should the directors of a narcotics distribution business be punished less severely than their subordinates who merely peddle the poison? It is unlikely that Congress so intended. See *Callanan* v. *United States*, 364 U. S. 587, 593–594.

Since an ordinary reading of § 406 [1] of the Comprehensive Drug Abuse Prevention and Control Act of 1970 implies that a conspirator may be punished just as severely as a substantive offender, I would so construe the statute. This construction is fortified by the total absence of any statement by any legislator suggesting any purpose to treat conspirators in the drug trade with any greater lenity than substantive offenders.[2] This is particularly important in view of the fact that prior to the 1970 Act, Congress had authorized

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[1] "Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 84 Stat. 1265, 21 U. S. C. § 846.

[2] Surely the Court's reference *ante*, at 399, to the offense of attempt cuts the other way, for it is common for legislation to authorize the same range of punishments for attempts as for substantive offenses. See, *e. g.*, American Law Institute, Model Penal Code § 5.05 (1) (Prop. Off. Draft 1962), which provides in part: "Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy."

identical penalties for conspiracies and completed offenses. See *ante*, at 391.

Because the statutory language conveys quite a different meaning to me, and because the Court has not paused to consider the narrow issue presented by this case in the context of the larger objectives Congress was seeking, I respectfully dissent.

ANDERSON, WARDEN *v.* CHARLES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79–1377. Decided June 16, 1980

At respondent's murder trial in a Michigan court resulting in his conviction, he was asked on cross-examination why he told the jury on direct examination a different story about stealing the murder victim's car than he had told the police officers following his arrest after being given *Miranda* warnings. After his conviction was affirmed on appeal, respondent unsuccessfully sought a writ of habeas corpus in Federal District Court, but the Court of Appeals reversed, holding that the cross-examination violated due process under the rule of *Doyle* v. *Ohio*, 426 U. S. 610.

Held: The cross-examination did not violate due process. *Doyle*, which held that the Due Process Clause of the Fourteenth Amendment prohibits impeachment on the basis of a defendant's silence following *Miranda* warnings, does not apply to cross-examination, such as occurred here, that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent.

Certiorari granted; 610 F. 2d 417, reversed.

PER CURIAM.

Respondent Glenn Charles was arrested in Grand Rapids, Mich., while driving a stolen car. The car belonged to Theodore Ziefle, who had been strangled to death in his Ann Arbor home less than a week earlier. The respondent was charged with first-degree murder. At his trial in the Circuit Court of Washtenaw County, Mich., the State presented circumstantial evidence linking the respondent with the crime. The respondent was found with Ziefle's car and some of his other personal property. The respondent also owned clothing like that worn by the man last seen with the victim, and he boasted to witnesses that he had killed a man and stolen

his car. Police Detective Robert LeVanseler testified that he interviewed the respondent shortly after his arrest. After giving the respondent *Miranda* warnings, LeVanseler asked him about the stolen automobile. According to LeVanseler, the respondent said that he stole the car in Ann Arbor from the vicinity of Washtenaw and Hill Streets, about two miles from the local bus station.

The respondent testified in his own behalf. On direct examination, he stated that he took Ziefle's unattended automobile from the parking lot of Kelly's Tire Co. in Ann Arbor. On cross-examination, the following colloquy occurred:

"Q. Now, this Kelly's Tire Company, that's right next to the bus station, isn't it?

"A. That's correct.

"Q. And, the bus station and Kelly's Tire are right next to the Washtenaw County Jail are they not?

"A. They are.

"Q. And, when you're standing in the Washtenaw County Jail looking out the window you can look right out and see the bus station and Kelly's Tire, can you not?

"A. That's correct.

"Q. So, you've had plenty of opportunity from—well, first you spent some time in the Washtenaw County Jail, haven't you?

"A. Quite a bit.

"Q. And, you have had plenty of opportunity to look out that window and see the bus station and Kelly's Tire?

"A. That's right.

"Q. And, you've seen cars being parked there, isn't that right?

"A. That's correct.

"Q. Is this where you got the idea to come up with the story that you took a car from that location?

"A. No, the reason I came up with that is because it's the truth.

"Q. It's the truth?

"A. That's right.

"Q. Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?

"A. No, I don't.

"Q. You don't think that's odd?

"A. I wasn't charged with auto theft, I was charged with murder.

"Q. Didn't you think at the time you were arrested that possibly the car would have something to do with the charge of murder?

"A. When I tried to talk to my attorney they wouldn't let me see him and after that he just said to keep quiet.

"Q. This is a rather recent fabrication of yours isn't [*sic*] it not?

"A. No it isn't.

"Q. Well, you told Detective LeVanseler back when you were first arrested, you stole the car back on Washtenaw and Hill Street?

"A. Never spoke with Detective LeVanseler.

"Q. Never did?

"A. Right, except when Detective Hall and Price were there and then it was on tape." Trial Transcript 302–304.

The jury convicted the respondent of first-degree murder. The Michigan Court of Appeals affirmed, *People* v. *Charles*, 58 Mich. App. 371, 227 N. W. 2d 348 (1975), and the Michigan Supreme Court denied leave to appeal, 397 Mich. 815 (1976). The respondent then sought a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The District Court withheld the writ, but a divided panel of the Court of Appeals for the Sixth Circuit

reversed. The Court of Appeals held that "the prosecutor's questions about [respondent's] post-arrest failure to tell officers the same story he told the jury violated due process" under the rule of *Doyle* v. *Ohio*, 426 U. S. 610 (1976). 610 F. 2d 417, 422 (1979).[1] The prison warden now petitions for a writ of certiorari. We grant the petition, grant the respondent leave to proceed *in forma pauperis*, and reverse the judgment of the Court of Appeals.

In *Doyle*, we held that the Due Process Clause of the Fourteenth Amendment prohibits impeachment on the basis of a defendant's silence following *Miranda* warnings. The case involved two defendants who made no postarrest statements about their involvement in the crime.[2] Each testified at trial that he had been framed. On cross-examination, the prosecutor asked the defendants why they had not told the frameup story to the police upon arrest. We concluded that such impeachment was fundamentally unfair because *Miranda* warnings inform a person of his right to remain silent and

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[1] Neither the Court of Appeals nor the state courts addressed the question whether *Doyle* should be applied retroactively. Although the petitioner now claims that *Doyle* should be limited to prospective application, see *Stovall* v. *Denno*, 388 U. S. 293 (1967), there is no indication that this claim was raised in the courts below. Moreover, the respondent asserts that *Doyle*'s prohibition against use of postarrest silence was the law of the Sixth Circuit and of the State of Michigan long before his arrest. In view of our disposition of the merits of this controversy, we express no view on the retroactivity question.

[2] One defendant said nothing at all. The other asked arresting officers, "[W]hat's this all about?" 426 U. S., at 615, n. 5. When told the reason for his arrest, he exclaimed "you got to be crazy," or "I don't know what you are talking about." *Id.*, at 622–623, n. 4 (STEVENS, J., dissenting). Both the Court and the dissent in *Doyle* analyzed the due process question as if both defendants had remained silent. The issue was said to involve cross-examination of a person who "does remain silent" after police inform him that he is legally entitled to do so. *Id.*, at 620 (STEVENS, J., dissenting); see *id.*, at 616–619; *id.*, at 621, 622, 626 (STEVENS, J., dissenting). In any event, neither the inquiry nor the exclamation quoted above contradicted the defendant's later trial testimony.

assure him, at least implicitly, that his silence will not be used against him. 426 U. S., at 618–619; see *Jenkins* v. *Anderson, ante*, at 239–240.

Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all. See *United States* v. *Agee*, 597 F. 2d 350, 354–356 (CA3) (en banc), cert. denied, 442 U. S. 944 (1979); *United States* v. *Mireles*, 570 F. 2d 1287, 1291–1293 (CA5 1978); *United States* v. *Goldmon*, 563 F. 2d 501, 503–504 (CA1 1977), cert. denied, 434 U. S. 1067 (1978).

In this case, the Court of Appeals recognized that the respondent could be questioned about prior statements inconsistent with his trial testimony. The court therefore approved the "latter portion of the above quoted cross-examination. . . ." 610 F. 2d, at 421. But the Court of Appeals found that "the earlier portion of the exchange" concerned the "separate issu[e]" of the respondent's "failure to tell arresting officers the same story he told the jury." *Ibid.* In the court's view, these questions were unconstitutional inquiries about postarrest silence. Thus, the Court of Appeals divided the cross-examination into two parts. It then applied *Doyle* to bar questions that concerned the respondent's failure to tell the police the story he recounted at trial.

We do not believe that the cross-examination in this case can be bifurcated so neatly. The quoted colloquy, taken as a whole, does "not refe[r] to the [respondent's] exercise of his right to remain silent; rather [it asks] the [respondent] why, if [his trial testimony] were true, he didn't tell the officer that he stole the decedent's car from the tire store parking lot instead of telling him that he took it from the

street." 58 Mich. App., at 381, 227 N. W. 2d, at 354. Any ambiguity in the prosecutor's initial questioning was quickly resolved by explicit reference to Detective LeVanseler's testimony, which the jury had heard only a few hours before. The questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement.

We conclude that *Doyle* does not apply to the facts of this case. Each of two inconsistent descriptions of events may be said to involve "silence" insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of "silence," and we find no reason to adopt such a view in this case.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissents and would affirm the judgment of the Court of Appeals for the reasons stated in its opinion.

ILLINOIS *v.* VITALE

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 78–1845. Argued January 8, 1980—Decided June 19, 1980

As the result of an accident in which an automobile driven by respondent struck and killed two children, respondent was convicted for failing to reduce speed to avoid the accident in violation of an Illinois statute. Subsequently, based on the same accident, respondent was charged with involuntary manslaughter under another Illinois statute. Ultimately, after the Illinois trial and intermediate appellate courts had held that the manslaughter prosecution was barred on statutory grounds, the Illinois Supreme Court held that it was barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, the court reasoning that because the lesser offense required no proof beyond that necessary for a conviction of the greater offense of involuntary manslaughter, the greater offense was the "same" as the lesser-included offense.

Held: The Double Jeopardy Clause does not necessarily prohibit Illinois from prosecuting respondent for involuntary manslaughter. Pp. 415–421.

(a) Whether the offense of failing to reduce speed to avoid an accident is the "same offense" for double jeopardy purposes as the manslaughter charges, depends on whether each statute in question requires proof of a fact which the other does not. *Blockburger* v. *United States,* 284 U. S. 299. Pp. 415–416.

(b) Thus, if manslaughter by automobile does not always entail proof of a failure to reduce speed, then the two offenses are not the "same" under the *Blockburger* test. And the mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. Pp. 416–419.

(c) But, if as a matter of Illinois law, a careless failure to reduce speed is always a necessary element of manslaughter by automobile, then the two offenses are the "same" under *Blockburger* and respondent's trial on the latter charge would constitute double jeopardy. *Brown* v. *Ohio,* 432 U. S. 161. In any event, if in the pending manslaughter prosecution Illinois relies on and proves a failure to reduce speed to avoid an accident as the reckless act necessary to prove manslaughter, respondent would have a substantial claim of double jeopardy. Pp. 419–421.

(d) Because the relationship under Illinois law between the crimes of involuntary manslaughter and a careless failure to reduce speed to avoid an accident is unclear, and because the reckless act or acts the State will rely on to prove manslaughter are still unknown, the Illinois Supreme Court's judgment is vacated and the case is remanded to that court for further proceedings. P. 421.

71 Ill. 2d 229, 375 N. E. 2d 87, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post*, p. 421.

James S. Veldman argued the cause for petitioner. With him on the briefs were *William J. Scott*, Attorney General of Illinois, *Donald B. MacKay* and *Melbourne A. Noel, Jr.*, Assistant Attorneys General, *Bernard Carey*, and *Marcia B. Orr*.

Lawrence G. Dirksen argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question in this case is whether the Double Jeopardy Clause of the Fifth Amendment prohibits the State of Illinois (State) from prosecuting for involuntary manslaughter the driver of an automobile involved in a fatal accident, who previously has been convicted for failing to reduce speed to avoid the collision.

I

On November 24, 1974, an automobile driven by respondent John Vitale, a juvenile, struck two small children. One of the children died almost immediately; the other died the following day. A police officer at the scene of the accident issued a traffic citation charging Vitale with failing to reduce speed to avoid an accident in violation of § 11–601 (a) of the Illinois Vehicle Code. Ill. Rev. Stat., ch. 95½, § 11–601 (a) (1979). This statute provides in part that "[s]peed must be

decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care." [1]

On December 23, 1974, Vitale appeared in the Circuit Court of Cook County, Ill., and entered a plea of not guilty to the charge of failing to reduce speed.[2] After a trial without a jury, Vitale was convicted and sentenced to pay a fine of $15.[3]

On the following day, December 24, 1974, a petition for adjudication of wardship was filed in the juvenile division of

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[1] Section 11–601 (a) of the Illinois Vehicle Code, Ill. Rev. Stat., ch. 95½, § 11–601 (a) (1979), provides:

"No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions and the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

[2] With respect to the traffic offense, the record contains a copy of the complaint, which charged that respondent on "Wednesday, November 20, 1974, 12:29 p. m., did then and there operate a certain motor vehicle upon a public highway of this State, to wit 170th and Ingleside in Thornton, situated in Cook County, Illinois, and did then and there violate section 11–601 (a) of the Illinois Vehicle Code by failure to reduce speed to avoid an accident." (Record 66–67.) Notations on the back of the complaint indicate that Vitale pleaded not guilty, waived a jury trial, was found guilty, and fined.

[3] Failing to reduce speed to avoid an accident is punishable by no more than 30 days in jail or by a fine of no more than $500. Ill. Rev. Stat., ch. 95½, § 16–104 (a) (1975), and ch. 38, §§ 1005–9–1 and 1005–8–3 (1979).

the Circuit Court of Cook County, charging Vitale with two counts of involuntary manslaughter.[4] The petition, which was signed by the police officer who issued the traffic citation, alleged that Vitale "without lawful justification while recklessly driving a motor vehicle caused the death of" the two children killed in the November 20, 1974, accident. App. 2–4.

Vitale's counsel filed a motion to dismiss on the grounds, among others, that the manslaughter prosecution was "violative of statutory and/or constitutional double jeopardy," *id.*, at 7, because of Vitale's previous conviction for failing to reduce speed to avoid the accident. The juvenile court found it unnecessary to reach a constitutional question because it held that the manslaughter prosecution was barred by Illinois statutes requiring, with certain nonpertinent exceptions, that all offenses based on the same conduct be prosecuted in a single prosecution. Ill. Rev. Stat., ch. 38, §§ 3–3 and 3–4 (b)(1) (1979).[5] The juvenile court dismissed the petition for

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[4] At the time Vitale was prosecuted, § 9–3 of the Illinois Criminal Code, Ill. Rev. Stat., ch. 38, § 9–3 (1973), provided:

"(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly. (b) If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide."

[5] Section 3–3 of the Illinois Criminal Code, Ill. Rev. Stat., ch. 38, § 3–3 (1979), provides:

"(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. (b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act. (c) When 2 or more offenses are charged as required by Subsec-

adjudication of wardship and the State appealed. The Appellate Court of Illinois, First District, *In re Vitale*, 44 Ill. App. 3d 1030, 358 N. E. 2d 1288 (1976), affirmed the holding that the manslaughter prosecution was barred by the state compulsory joinder statutes. Ill. Rev. Stat., ch. 38, §§ 3–3 and 3–4 (b)(1) (1979).

The Supreme Court of Illinois, with two justices dissenting, affirmed on other grounds. *In re Vitale*, 71 Ill. 2d 229, 375 N. E. 2d 87 (1978). The court did not reach the state statutory question for it found "a more compelling reason why respondent cannot be prosecuted for the offense of involuntary manslaughter": the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment. After analyzing the elements of each offense, the court held that because "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter, . . . for purposes of the double jeopardy clause, the greater offense is by definition the 'same' as the lesser offense included within it." *Id.*, at 239, 375 N. E. 2d, at 91. Thus the court concluded that the man-

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tion (b), the court in the interest of justice may order that one or more of such charges be tried separately."

Section 3–4 (b) of the Illinois Criminal Code, Ill. Rev. Stat., ch. 38, § 3–4 (b) (1979), provides in pertinent part:

"A prosecution is barred if the defendant was formerly prosecuted for a different offense, . . . if such former prosecution: (1) Resulted in either a conviction or an acquittal, and the subsequent prosecution . . . was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3–3 of this Code (unless the court ordered a separate trial of such charge). . . ."

The juvenile court held that because the prosecution knew at the time the traffic offense was prosecuted that the automobile accident had resulted in the deaths that were the basis of the manslaughter charges, § 3–3 required that the traffic offense and the manslaughter charges be prosecuted in a single prosecution. The court therefore concluded that the manslaughter prosecution was barred by § 3–4 (b)(1).

slaughter prosecution was barred by the Double Jeopardy Clause.

The dissenting justices argued that the manslaughter prosecution was not barred by the Double Jeopardy Clause because the homicide charge could be proved by showing one or more reckless acts other than the failure to reduce speed. *Id.*, at 242, 251–253, 375 N. E. 2d, at 93, 96–97 (Underwood, J., joined by Ryan, J., dissenting).

On November 27, 1978, we granted the State's petition for certiorari, vacated the judgment, and remanded the case to the Supreme Court of Illinois to consider whether its judgment was based upon federal or state constitutional grounds. 439 U. S. 974 (1978). After the Supreme Court of Illinois, on remand, certified that its judgment was based upon federal constitutional grounds, we again granted a writ of certiorari. 444 U. S. 823 (1979).

II

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This constitutional guarantee is applicable to the States through the Due Process Clause of the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), and it applies not only in traditional criminal proceedings but also in the kind of juvenile proceedings Vitale faced. *Breed* v. *Jones*, 421 U. S. 519 (1975).

The constitutional prohibition of double jeopardy has been held to consist of three separate guarantees: (1) "It protects against a second prosecution for the same offense after acquittal. [(2) I]t protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969) (footnotes omitted). Because Vitale asserts that his former conviction for failing to reduce speed bars his manslaughter prosecution, we are concerned with only the second of these three guarantees in the instant case. The sole question before us is whether the

offense of failing to reduce speed to avoid an accident is the "same offense" for double jeopardy purposes as the manslaughter charges brought against Vitale.

In *Brown* v. *Ohio*, 432 U. S. 161 (1977), we stated the principal test for determining whether two offenses are the same for purposes of barring successive prosecutions. Quoting from *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), which in turn relied on *Gavieres* v. *United States*, 220 U. S. 338, 342–343 (1911), we held that

> "'[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" 432 U. S., at 166.

We recognized that the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial. Thus we stated that if "'each *statute* requires proof of an additional fact which the other does not,' *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871)," the offenses are not the same under the *Blockburger* test. 432 U. S., at 166 (emphasis supplied); *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975).[6]

III

We accept, as we must, the Supreme Court of Illinois' identification of the elements of the offenses involved here. Under Illinois law, involuntary manslaughter with a motor vehicle involves a homicide by the "reckless operation of a motor vehicle in a manner likely to cause death or great bodily

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[6] In *Iannelli* v. *United States*, 420 U. S., at 785, n. 17, we stated: "[T]he Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."

harm." *In re Vitale*, 71 Ill. 2d, at 239, 375 N. E. 2d, at 91. The charge of failing to reduce speed on which respondent was convicted requires proof "that the defendant drove carelessly and failed to reduce speed to avoid colliding with a person." *Id.*, at 238, 375 N. E. 2d, at 91. The Illinois court, after specifying these elements, then stated that "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter" and concluded, as a matter of federal law, that "the greater offense is by definition the 'same' as the lesser offense included within it." *Id.*, at 239, 375 N. E. 2d, at 91.

The Illinois court relied upon our holding in *Brown* v. *Ohio*, *supra*, that a conviction for a lesser-included offense precludes later prosecution for the greater offense. There, Brown was first convicted of joyriding in violation of an Ohio statute under which it was a crime to "take, operate, or keep any motor vehicle without the consent of its owner." He was then convicted under another statute of stealing the same motor vehicle. The Ohio courts had held that every element of the joyriding "is also an element of the crime of auto theft," and that to prove auto theft one need prove in addition to joyriding only the intent permanently to deprive the owner of possession. Holding that the second prosecution was barred, by the Double Jeopardy Clause and the Fourteenth Amendment, we observed that "the prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft." *Id.*, at 167. But we also noted that "the prosecutor who has established auto theft necessarily has established joyriding as well." *Id.*, at 168.

Both observations were essential to the *Brown* holding. Had the State been able to prove auto theft, without also proving that the defendant took, operated, or kept the auto without the consent of the owner—if proof of the auto theft had not necessarily involved proof of joyriding—the successive prosecutions would not have been for the "same offense" within the meaning of the Double Jeopardy Clause.

Vitale does not dispute this proposition, but insists that the Illinois court fully satisfied *Brown* when it held that the lesser offense of failure to reduce speed "requires no proof beyond that which is necessary for a conviction of the greater, involuntary manslaughter." It is clear enough from the opinion below that manslaughter by motor vehicle could be proved against Vitale by showing a death caused by his recklessly failing to slow his vehicle to avoid a collision with the victim. Proving manslaughter in this way would also prove careless failure to slow; nothing more would be needed to prove the latter offense, an offense for which Vitale has already been convicted.

The State, however, does not concede that its manslaughter charge will or must rest on proof of a reckless failure to slow; it insists that manslaughter by automobile need not involve any element of failing to reduce speed. The petition for wardship charging manslaughter alleged only that Vitale "without lawful justification, while recklessly driving a motor vehicle, caused [two] death[s]" in violation of the manslaughter statute. Further, the dissenting justices relied upon the absence of any showing that the manslaughter charge on which respondent had not been tried, would rest upon his reckless failure to reduce speed. Nor could it be known, in their view, what particular reckless acts might be relied upon to prove the homicide charge.[7] The State agrees, and sub-

[7] "The petition for wardship may have been based on Vitale's acts in permitting his attention to be diverted while driving at a high rate of speed, failing to appropriately maintain the vehicle's braking system, failing to note the seven school zone and speed warning signs, initially raising the speed of his auto to a dangerous level, or by disobeying the commands of the crossing guard. While we do not now know which of that series of acts the State intended to rely on at trial, one certainly cannot now say that it would rely solely upon Vitale's failure to reduce speed to the exclusion of his other misconduct." *In re Vitale*, 71 Ill. 2d 229, 251, 375 N. E. 2d 87, 97 (1978) (Underwood, J., dissenting).

The police report concerning Vitale's accident noted that the brakes on the automobile were defective and that there had been a school crossing

mits that because it is not necessary to prove a failure to slow to establish manslaughter, the rule of *Brown* v. *Ohio* does not bar its homicide case against Vitale.

The Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also proving a careless failure to reduce speed, and we are reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision.

Of course, any collision between two automobiles or between an automobile and a person involves a *moving* automobile and in that sense a "failure" to slow sufficiently to avoid the accident. But such a "failure" may not be reckless or even careless, if, when the danger arose, slowing as much as reasonably possible would not alone have avoided the accident. Yet, reckless driving causing death might still be proved if, for example, a driver who had not been paying attention could have avoided the accident at the last second, had he been paying attention, by simply swerving his car. The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.

IV

If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the "same" under *Blockburger* and

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guard and a stop sign at the intersection where the accident occurred. (Record 29, 30.)

Vitale's trial on the latter charge would constitute double jeopardy under *Brown* v. *Ohio*.[8] In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977).

In *Harris*, we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. The Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution.[9] But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of

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[8] We recognized in *Brown* v. *Ohio*, 432 U. S., at 169, n. 7 that "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." This exception is not applicable here because the trial court found that the prosecution was aware that Vitale's accident had resulted in two deaths at the time he was prosecuted for failing to reduce speed.

[9] The Oklahoma felony-murder statute under which Harris was convicted, Okla. Stat., Tit. 21, § 701 (3) (1971), provided that homicide is murder "[w]hen perpetrated without any design to effect death by a person engaged in the commission of any felony."

which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under *In re Nielsen*, 131 U. S. 176 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense—an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under *Brown*, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.

By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.

V

Because of our doubts about the relationship under Illinois law between the crimes of manslaughter and a careless failure to reduce speed to avoid an accident, and because the reckless act or acts the State will rely on to prove manslaughter are still unknown, we vacate the judgment of the Illinois Supreme Court and remand the case to that court for further proceedings not inconsistent with this opinion.[10]

So ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

The controlling issue in this case is whether respondent's failure to reduce speed to avoid a collision, in violation of

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[10] We note also that the Illinois Supreme Court did not reach the question whether the lower Illinois courts were correct in dismissing the manslaughter case under the State's compulsory joinder statute.

§ 11–601 (a) of the Illinois Motor Vehicle Code,[1] was a lesser offense included within the greater offense of killing a person by the reckless "driving of a motor vehicle," in violation of § 9–3 (b) of the Illinois Criminal Code.[2] The Illinois Supreme Court held that it was and that, because respondent had already been convicted on the lesser charge, the State was barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, from prosecuting him on the greater charge.

There are two separate reasons, each of which is sufficient in itself, for affirming the judgment of the Illinois Supreme Court. First, after applying the test set forth in *Brown* v. *Ohio*, 432 U. S. 161, the Illinois Supreme Court made a finding that failing to reduce speed to avoid a collision is a lesser-included offense of reckless homicide as a matter of state law. This Court clearly has a duty to respect that finding. Second, even if the dissenting members of the Illinois Supreme Court were correct in their view that, as a matter of state law, the traffic offense is not necessarily a lesser-included

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[1] Illinois Rev. Stat., ch. 95½, § 11–601 (a) (1979), provides:

"No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions and the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. *Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.*" (Emphasis supplied.)

[2] "If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide." Ill. Rev. Stat., ch. 38, § 9–3 (b) (1973).

offense in every reckless homicide prosecution, the Double Jeopardy Clause bars the homicide prosecution under the particular facts of this case. For, even if the State intended to rely on evidence other than respondent's failure to reduce speed to establish the element of reckless driving necessary for a homicide conviction, the prosecutor's failure to apprise the respondent and the court of such a theory at some point in the lengthy proceedings on the double jeopardy issue should bar the second trial in this case.

I

Relying on *Blockburger* v. *United States*, 284 U. S. 299, the Court holds that the question the Illinois Supreme Court should have addressed in this case was whether proof of reckless homicide by vehicle will always, in each and every case, establish the defendant's guilt of the traffic offense as well. If not, the Court states that the traffic offense is not necessarily the "same offense" for double jeopardy purposes and therefore the second prosecution may not be barred by the Double Jeopardy Clause.[3] *Ante*, at 419. The Court then goes on to discuss the position of the dissenting justices in the Illinois Supreme Court that it is theoretically possible for an Illinois prosecutor to prove a charge of reckless homicide by vehicle without proving a failure to reduce speed in order to avoid a collision. Because it finds the majority's response to this argument "cryptic," the Court refuses to accept the Illinois court's clear determination that the traffic offense is a lesser-included offense of reckless homicide; instead, it reverses and remands for a new determination as to whether "under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision."[4]

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[3] See the discussion of Part IV of the Court's opinion, *infra*, at 426.

[4] "The Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also proving a

I cannot agree that this is an appropriate disposition. As the Court itself recognizes, it is not the province of this or any other federal court to tell the State of Illinois what is or is not a lesser-included offense under state law.[5] To the extent that this Court has any role at all, it is to ensure that the States apply the proper analytic framework insofar as they rely on the Double Jeopardy Clause of the Federal Constitution. Unlike the Court, I have no doubt that in this case the Illinois Supreme Court did apply the proper test.

As the dissenting justices in the Illinois Supreme Court pointed out at some length, the Illinois courts are hardly unfamiliar with the *Blockburger* test, having consistently applied it for many years in determining whether two offenses are the same for purposes of either the Double Jeopardy Clause or the State's own compulsory joinder statute. *In re Vitale*, 71 Ill. 2d 229, 244–245, 375 N. E. 2d 87, 93–94 (1978). In this case the majority of the Illinois court did not purport

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careless failure to reduce speed, and we are reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision." *Ante*, at 419.

[5] Despite its apparent agreement with the dissenters' reading of the Illinois statutes, see *ibid.*, the Court does not hold that the Illinois Supreme Court is foreclosed from concluding on remand that failure to reduce speed is a lesser-included offense of reckless homicide by vehicle. On the contrary, the Court states:

"If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy under *Brown* v. *Ohio*." *Ante*, at 419–420.

See also *Brown* v. *Ohio*, 432 U. S. 161, 167, where the Court reiterated that state courts "'have the final authority to interpret . . . that State's legislation.' *Garner* v. *Louisiana*, 368 U. S. 157, 169 (1961)," and thus accepted as "authoritative" the Ohio courts' definition of the elements of the two offenses.

to deviate from that test. On the contrary, it relied heavily on this Court's opinion in *Brown* v. *Ohio, supra,* which in turn relied upon *Blockburger.*

Thus, after examining the statutory definitions of the two crimes at issue in this case, without reference to the particular facts of this case, the Illinois Supreme Court concluded:

> "As is usually the situation between greater and lesser included offenses, the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter. Accordingly, for purposes of the double jeopardy clause, the greater offense is by definition the 'same' as the lesser offense included within it." 71 Ill. 2d, at 239, 375 N. E. 2d, at 91.

In so holding, the court made the same finding as this Court did in *Brown* v. *Ohio*:

> "Applying the *Blockburger* test, we agree with the Ohio Court of Appeals that joyriding and auto theft, as defined by that court, constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause. App. 23. For it is clearly *not* the case that 'each [statute] requires proof of a fact which the other does not.' 284 U. S., at 304. As is invariably true of a greater and lesser included offense, the lesser offense—joyriding—requires no proof beyond that which is required for conviction of the greater—auto theft. The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." 432 U. S., at 168.

Having made the finding required by *Brown* v. *Ohio,* based on its interpretation of its own law, the Illinois Supreme Court should not now be required to go through the process all over again simply to assure this Court that it really meant what it plainly said.

II

In Part IV of its opinion the Court states that, even if the Illinois Supreme Court should hold on remand that failure to reduce speed is not always a lesser-included offense as a matter of state law, respondent will still have a "substantial" double jeopardy claim if the State finds it necessary to rely on his failure to reduce speed in order to sustain its manslaughter case. In my opinion such a claim would not merely be "substantial"; it would be dispositive.

In *Harris* v. *Oklahoma*, 433 U. S. 682, we held that a conviction on a felony-murder charge barred a subsequent prosecution for robbery, where the robbery had been used to establish the requisite intent on the murder charge. Cf. *Whalen* v. *United States*, 445 U. S. 684. Since it was theoretically possible that a different felony could have supported the murder charge, such a result may not have been required by a literal application of the *Blockburger* test, see *Whalen* v. *United States*, *supra*, at 708–711 (REHNQUIST, J., dissenting). However, the entire Court agreed that it was required by the Double Jeopardy Clause. In this case, it is equally clear that the State could not use respondent's failure to reduce speed to avoid a collision as the reckless act necessary to establish reckless homicide by vehicle, even if theoretically his recklessness could be proved in some other way.

Throughout the five years that this case has been in litigation, the State has apparently not seen fit to reveal the basis of its homicide prosecution. The Court does not view this omission as an important one. On the contrary, its opinion implies that the State may proceed to trial before a determination is made on respondent's double jeopardy claim. But surely such a procedure is inconsistent with the Double Jeopardy Clause, which was specifically designed to protect the citizen from multiple trials. The vital interest in avoiding an unlawful second trial led the Court in *Abney* v. *United States*, 431 U. S. 651, to allow an appeal in advance of trial

in order to assure the defendant that the substance of his constitutional right to be protected against double jeopardy would not be lost before his plea could be vindicated. In that case the Court emphasized that "the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense." *Id.*, at 660–661 (emphasis in original). Continuing, the Court stated:

> "Because of this focus on the 'risk' of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. Mr. Justice Black aptly described the purpose of the Clause:
>
> " 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' *Green* [v. *United States*, 355 U. S. 184,] 187–188.
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> ". . . [I]f a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.*, at 661–662. (Emphasis in original.)

If a defendant is entitled to have an appellate court rule on his double jeopardy claim in advance of trial, he is surely entitled to a definitive ruling by the trial court in advance

of trial. Since the State has not provided the respondent with notice of any basis for the prosecution that does not depend upon proving, for the second time, a careless failure to reduce speed, I would not require this respondent to stand trial again.

I respectfully dissent.

REEVES, INC. *v.* STAKE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79–677. Argued April 16, 1980—Decided June 19, 1980

For more than 50 years, South Dakota has operated a cement plant that produced cement for both state residents and out-of-state buyers. In 1978, because of a cement shortage, the State Cement Commission announced a policy to confine the sale of cement by the state plant to residents of the State. This policy forced petitioner ready-mix concrete distributor, one of the out-of-state buyers, to cut its production severely. Petitioner then brought suit in Federal District Court, challenging the policy. The court granted injunctive relief on the ground that the policy violated the Commerce Clause. The Court of Appeals reversed on the ground that the State had simply acted in a proprietary capacity.

Held: South Dakota's resident-preference program for the sale of cement does not violate the Commerce Clause. Pp. 434–447.

(a) "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 810. Pp. 434–436.

(b) The Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace, and there is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. Restraint in this area is also counseled by considerations of state sovereignty, each State's role as guardian and trustee for its people, and the recognized right of a trader to exercise discretion as to the parties with whom he will deal. Moreover, state proprietary activities often are burdened with the same restrictions as private market participants. And, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, the adjustment of interests in this context is, as a rule, better suited for Congress than this Court. Pp. 436–439.

(c) The arguments for invalidating South Dakota's resident-preference program—that the State, having long exploited the interstate market for cement, should not be permitted to withdraw from it when a shortage

arises; that the program responds solely to the nongovernmental objective of protectionism; that hoarding may have undesirable consequences; that the program places South Dakota suppliers of ready-mix concrete at a competitive advantage in the out-of-state market; and that if South Dakota had not acted, free market forces would have generated an appropriate level of supply at free market prices for all buyers in the region—are weak at best. Whatever residual force inheres in them is more than offset by countervailing considerations of policy and fairness. To invalidate the program would discourage similar state projects and rob South Dakota of the intended benefit of its foresight, risk, and industry. Pp. 440–447.

603 F. 2d 736, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN, WHITE, and STEVENS, JJ., joined, *post*, p. 447.

Dennis M. Kirven argued the cause and filed a brief for petitioner.

William J. Janklow argued the cause for respondents. On the brief were *Michael B. DeMersseman* and *Curtis S. Jensen*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether, consistent with the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, the State of South Dakota, in a time of shortage, may confine the sale of the cement it produces solely to its residents.

I

In 1919, South Dakota undertook plans to build a cement plant. The project, a product of the State's then prevailing Progressive political movement, was initiated in response to recent regional cement shortages that "interfered with and delayed both public and private enterprises," and that were "threatening the people of this state." *Eakin* v. *South Dakota State Cement Comm'n*, 44 S. D. 268, 272, 183 N. W. 651, 652

(1921).[1] In 1920, the South Dakota Cement Commission anticipated "[t]hat there would be a ready market for the entire output of the plant within the state." Report of State

[1] It was said that the plant was built because the only cement plant in the State "had been operating successfully for a number of years until it had been bought by the so-called trust and closed down." Report of South Dakota State Cement Commission 6 (1920). In its report advocating creation of a cement plant, the Commission noted both the substantial profits being made by private producers in the prevailing market, and the fact that producers outside the State were "now supplying all the cement used in" South Dakota. Under the circumstances, the Commission reasoned, it would not be to the "capitalists[']. . . advantage to build a new plant within the state." *Id.*, at 8. This skepticism regarding private industry's ability to serve public needs was a hallmark of Progressivism. See, *e. g.*, R. Hofstadter, The Age of Reform 227 (1955) ("In the Progressive era the entire structure of business . . . became the object of a widespread hostility"). South Dakota, earlier a bastion of Populism, *id.*, at 50, became a leading Progressivist State. See R. Nye, Midwestern Progressive Politics 217–218 (1959); G. Mowry, Theodore Roosevelt and the Progressive Movement 155, and n. 125 (1946). Roosevelt carried South Dakota in the election of 1912, *id.*, at 281, n. 69, and Robert La Follette—on a platform calling for public ownership of railroads and waterpower, see K. MacKay, The Progressive Movement of 1924, pp. 270–271 (app. 4) (1966)—ran strongly (36.9%) in the State in 1924. Congressional Quarterly's Guide to U. S. Elections 287 (1975).

The backdrop against which the South Dakota cement project was initiated is described in H. Schell, History of South Dakota 268–269 (3d ed. 1975):

"Although a majority of the voters [in 1918] had seemingly subscribed to a state-ownership philosophy, it was a question how far the Republican administration at Pierre would go in fulfilling campaign promises. As [Governor] Norbeck entered upon his second term, he again urged a state hail insurance law and advocated steps toward a state-owned coal mine, cement plant, and state-owned stockyards. He also recommended an appropriation for surveying dam sites for hydroelectric development. The lawmakers readily enacted these recommendations into law, except for the stockyards proposal. . . .

". . . In retrospect, [Norbeck's] program must be viewed as a part of the Progressives' campaign against monopolistic prices. There was, moreover, the fervent desire to make the services of the state government

Cement Commission 9 (1920). The plant, however, located at Rapid City, soon produced more cement than South Dakotans could use. Over the years, buyers in no less than nine nearby States purchased cement from the State's plant. App. 26. Between 1970 and 1977, some 40% of the plant's output went outside the State.

The plant's list of out-of-state cement buyers included petitioner Reeves, Inc. Reeves is a ready-mix concrete [2] distributor organized under Wyoming law and with facilities in Buffalo, Gillette, and Sheridan, Wyo. *Id.*, at 15. From the beginning of its operations in 1958, and until 1978, Reeves purchased about 95% of its cement from the South Dakota plant. *Id.*, at 15 and 22. In 1977, its purchases were $1,172,000. *Id.*, at 17. In turn, Reeves has supplied three northwestern Wyoming counties with more than half their ready-mix concrete needs. *Id.*, at 15. For 20 years the relationship between Reeves and the South Dakota cement plant was amicable, uninterrupted, and mutually profitable.

As the 1978 construction season approached, difficulties at the plant slowed production. Meanwhile, a booming construction industry spurred demand for cement both regionally and nationally. *Id.*, at 13. The plant found itself unable to meet all orders. Faced with the same type of "serious cement shortage" that inspired the plant's construction, the Commission "reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commit-

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available to agriculture. . . . These were basic tenets of the Progressive philosophy of government."

[2] "[C]ement is a finely ground manufactured mineral product, usually gray in color. It is mixed with water and sand, gravel, crushed stone, or other aggregates to form concrete, the rock-like substance that is the most widely used construction material in the world." Portland Cement Association, The U. S. Cement Industry, An Economic Report 5 (2d ed. 1978). "Ready-mixed concrete is the term applied to ordinary concrete that is mixed at a central depot instead of on the construction site, and is distributed in special trucks." 4 Encyclopedia Britannica 1077 (1974).

ments, with the remaining volume allocated on a first come, first served basis." *Ibid.*[3]

Reeves, which had no pre-existing long-term supply contract, was hit hard and quickly by this development. On June 30, 1978, the plant informed Reeves that it could not continue to fill Reeves' orders, and on July 5, it turned away a Reeves truck. *Id.*, at 17–18. Unable to find another supplier, *id.*, at 21, Reeves was forced to cut production by 76% in mid-July. *Id.*, at 20.

On July 19, Reeves brought this suit against the Commission, challenging the plant's policy of preferring South Dakota buyers, and seeking injunctive relief. *Id.*, at 3–10. After conducting a hearing and receiving briefs and affidavits, the District Court found no substantial issue of material fact and permanently enjoined the Commission's practice. The court reasoned that South Dakota's "hoarding" was inimical to the national free market envisioned by the Commerce Clause. *Id.*, at 27–30.

The United States Court of Appeals for the Eighth Circuit reversed. *Reeves, Inc.* v. *Kelley*, 586 F. 2d 1230, 1232 (1978). It concluded that the State had "simply acted in a proprietary capacity," as permitted by *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976). Petitioner sought certiorari. This Court granted the petition, vacated the judgment, and remanded the case for further consideration in light of *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979). *Reeves, Inc.* v. *Kelley*, 441 U. S. 939 (1979). On remand, the Court of Appeals distinguished that case.[4] Again relying on *Alexandria*

[3] It is not clear when the State initiated its policy preferring South Dakota customers. The record, however, shows that the policy was in place at least by 1974. App. 24.

[4] We now agree with the Court of Appeals that *Hughes* v. *Oklahoma* does not bear on analysis here. That case involved a State's attempt " 'to prevent privately owned articles of trade from being shipped and sold in interstate commerce.' " *Philadelphia* v. *New Jersey*, 437 U. S. 617, 627 (1978), quoting *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10

Scrap, the court abided by its previous holding. *Reeves, Inc.* v. *Kelley*, 603 F. 2d 736 (1979). We granted Reeves' petition for certiorari to consider once again the impact of the Commerce Clause on state proprietary activity. 444 U. S. 1031 (1980).[5]

II

A

Alexandria Scrap concerned a Maryland program designed to remove abandoned automobiles from the State's roadways and junkyards. To encourage recycling, a "bounty" was offered for every Maryland-titled junk car converted into scrap. Processors located both in and outside Maryland were eligible to collect these subsidies. The legislation, as initially enacted in 1969, required a processor seeking a bounty to present documentation evidencing ownership of the wrecked car. This requirement however, did not apply to "hulks," inoperable automobiles over eight years old. In 1974, the statute was amended to extend documentation requirements to hulks, which comprised a large majority of the junk cars being processed. Departing from prior practice, the new law imposed more exacting documentation requirements on out-of-state than in-state processors. By making it less remunerative for suppliers to transfer vehicles outside Maryland, the

(1928). Thus, it involved precisely the type of activity distinguished by the Court in *Alexandria Scrap*. See 426 U. S., at 805–806.

[5] During the pendency of this litigation, economic conditions have permitted South Dakota to discontinue enforcement of its resident-preference policy. We agree with the parties, however, that the case has not become moot. During at least three construction seasons within as many decades the cement plant has been unable, or nearly unable, to satisfy demand. See, *e. g.*, Twelfth Biennial Report of the South Dakota State Cement Commission (1948); App. 23 (affidavit of C. A. Reeves). Under these circumstances, "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975).

reform triggered a "precipitate decline in the number of bounty-eligible hulks supplied to appellee's [Virginia] plant from Maryland sources." 426 U. S., at 801. Indeed, "[t]he practical effect was substantially the same as if Maryland had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed non-Maryland processors." *Id.*, at 803, n. 13; see *id.*, at 819 (dissenting opinion).

Invoking the Commerce Clause, a three-judge District Court struck down the legislation. 391 F. Supp. 46 (Md. 1975). It observed that the amendment imposed "substantial burdens upon the free flow of interstate commerce," *id.*, at 62, and reasoned that the discriminatory program was not the least disruptive means of achieving the State's articulated objective. *Id.*, at 63. See generally *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).[6]

This Court reversed. It recognized the persuasiveness of the lower court's analysis if the inherent restrictions of the Commerce Clause were deemed applicable. In the Court's view, however, *Alexandria Scrap* did not involve "the kind of action with which the Commerce Clause is concerned." 426 U. S., at 805. Unlike prior cases voiding state laws inhibiting interstate trade, "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price," *id.*, at 806, "as a purchaser, in effect, of a potential article of interstate commerce," and has restricted "its trade to its own citizens or businesses within the State." *Id.*, at 808.[7]

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[6] Maryland sought to justify its reform as an effort to reduce bounties paid to out-of-state processors on Maryland-titled cars abandoned outside Maryland. The District Court concluded that Maryland could achieve this goal more satisfactorily by simply restricting the payment of bounties to only those cars abandoned in Maryland.

[7] The Court invoked this rationale after explicitly reiterating the District Court's finding that the Maryland program imposed "'substantial

Having characterized Maryland as a market participant, rather than as a market regulator, the Court found no reason to "believe the Commerce Clause was intended to require independent justification for [the State's] action." *Id.*, at 809. The Court couched its holding in unmistakably broad terms. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.*, at 810 (footnote omitted).[8]

B

The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the

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burdens upon the free flow of interstate commerce.'" 426 U. S., at 804. Moreover, the Court was willing to accept the Virginia processor's characterization of the Maryland program as "reducing in some manner the flow of goods in interstate commerce." *Id.*, at 805. Given this concession, we are unable to accept the dissent's description of *Alexandria Scrap* as a case in which "we found no burden on commerce," *post*, at 451, "concluded that the subsidies . . . erected no barriers to trade," *post*, at 452, and determined that the Maryland program did not "cut off," *ibid.*, or "impede the flow of interstate commerce," *post*, at 450. Indeed, even the dissent in the present case recognizes that the Maryland subsidy program "divert[ed] Maryland 'hulks' to in-state processors." *Post*, at 451. To be sure, *Alexandria Scrap* rejected the argument that "the bounty program constituted an *impermissible* burden on interstate commerce." *Ibid.* (emphasis added). It did so, however, solely because Maryland had "entered into the market itself." 426 U. S., at 806. Thus, the two-step analysis distilled by the dissent from *Alexandria Scrap*, see *post*, at 451–453, collapses into a single inquiry: whether the challenged "program constituted direct state participation in the market." *Post*, at 451. The dissent agrees that that question is to be answered in the affirmative here. *Ibid.*

[8] The dissent's central criticisms of the result reached here seem to be that the South Dakota policy does not emanate from "the power of governments to supply their own needs," and that it threatens "'the natural functioning of the interstate market.'" *Post*, at 450. The same observations, however, apply with equal force to the subsidy program challenged in *Alexandria Scrap*.

Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. *Id.*, at 807–808, citing *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, 539 (1949) (referring to "home embargoes," "customs duties," and "regulations" excluding imports). There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. See L. Tribe, American Constitutional Law 336 (1978) ("the commerce clause was directed, as an historical matter, only at regulatory and taxing actions taken by states in their sovereign capacity"). The precedents comport with this distinction.[9]

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[9] *Alexandria Scrap* does not stand alone. In *American Yearbook Co.* v. *Askew*, 339 F. Supp. 719 (MD Fla. 1972), a three-judge District Court upheld a Florida statute requiring the State to obtain needed printing services from in-state shops. It reasoned that "state proprietary functions" are exempt from Commerce Clause scrutiny. *Id.*, at 725. This Court affirmed summarily. 409 U. S. 904 (1972). Numerous courts have rebuffed Commerce Clause challenges directed at similar preferences that exist in "a substantial majority of the states." Note, 58 Iowa L. Rev. 576 (1973). *City of Phoenix* v. *Superior Court*, 109 Ariz. 533, 535, 514 P. 2d 454, 456 (1973) (citing *American Yearbook* to reaffirm *Schrey* v. *Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P. 2d 604 (1953)); *Denver* v. *Bossie*, 83 Colo. 329, 266 P. 214 (1928); *In re Gemmill*, 20 Idaho 732, 119 P. 298 (1911); *People ex rel. Holland* v. *Bleigh Constr. Co.*, 61 Ill. 2d 258, 274–275, 335 N. E. 2d 469, 479 (1975) (citing *American Yearbook*); *State ex rel. Collins* v. *Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917); *Allen* v. *Labsap*, 188 Mo. 692, 87 S. W. 926 (1905); *Hersey* v. *Neilson*, 47 Mont. 132, 131 P. 30 (1913); *Tribune Printing & Binding Co.* v. *Barnes*, 7 N. D. 591, 75 N. W. 904 (1898). See also *Dixon-Paul Printing Co.* v. *Board of Public Contracts*, 117 Miss. 83, 77 So. 908 (1918); *Luboil Heat & Power Corp.* v. *Pleydell*, 178 Misc. 562, 564, 34 N. Y. S. 2d 587, 591 (Sup. 1942). The only clear departure from this pattern, *People ex rel. Treat* v. *Coler*, 166 N. Y. 144, 59 N. E. 776 (1901), drew a strong dissent, and has been uniformly criticized in later decisions. See, *e. g.*, *State ex rel. Collins* v. *Senatobia Blank Book & Stationery Co.*, *supra*; *Allen* v. *Labsap*, *supra*.

One other case merits comment. In *Bethlehem Steel Corp.* v. *Board of Commissioners*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969), the court

Restraint in this area is also counseled by considerations of state sovereignty,[10] the role of each State "'as guardian and trustee for its people,'" *Heim* v. *McCall*, 239 U. S. 175, 191 (1915), quoting *Atkin* v. *Kansas*, 191 U. S. 207, 222–223 (1903),[11] and "the long recognized right of trader or manu-

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struck down a California statute requiring the State to contract only with persons who promised to use or supply materials produced in the United States. In Opinion No. 69–253, 53 Op. Cal. Atty. Gen. 72 (1970), the State's Attorney General reasoned that *Bethlehem Steel* similarly prohibited, under the "foreign commerce" Clause, statutes giving a preference to California-produced goods. We have no occasion to explore the limits imposed on state proprietary actions by the "foreign commerce" Clause or the constitutionality of "Buy American" legislation. Compare *Bethlehem Steel Corp., supra*, with *K. S. B. Technical Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 75 N. J. 272, 381 A. 2d 774 (1977). We note, however, that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged. See *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979).

[10] See *American Yearbook Co.* v. *Askew*, 339 F. Supp., at 725 ("ad hoc" inquiry into burdening of interstate commerce "would unduly interfere with state proprietary functions if not bring them to a standstill"). Considerations of sovereignty independently dictate that marketplace actions involving "integral operations in areas of traditional governmental functions"—such as the employment of certain state workers—may not be subject even to congressional regulation pursuant to the commerce power. *National League of Cities* v. *Usery*, 426 U. S. 833, 852 (1976). It follows easily that the intrinsic limits of the Commerce Clause do not prohibit state marketplace conduct that falls within this sphere. Even where "integral operations" are not implicated, States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal. The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 56, 63 (1976).

[11] See *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S., at 13 ("As the representative of its people, the State might have retained the shrimp for consumption and use therein"); *Toomer* v. *Witsell*, 334 U. S. 385, 409 (1948) (concurring opinion) (state power to provide for own citizens by developing food supply distinguished from interference with private transactions in food products); *Helvering* v. *Gerhardt*, 304 U. S. 405, 427 (1938) (concurring opinion) ("The genius of our government provides that, within the sphere of constitutional action, the people . . .

facturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919).[12] Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants.[13] Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause. See *State ex rel. Collins* v. *Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 260, 76 So. 258, 260 (1917); *Tribune Printing & Binding Co.* v. *Barnes*, 7 N. D. 591, 597, 75 N. W. 904, 906 (1898). Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.

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have the power to determine as conditions demand, what services and functions the public welfare requires").

[12] When a State buys or sells, it has the attributes of both a political entity and a private business. Nonetheless, the dissent would dismiss altogether the "private business" element of such activity and focus solely on the State's political character. *Post*, at 450. The Court, however, heretofore has recognized that "*[l]ike private individuals and businesses*, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127 (1940) (emphasis added). While acknowledging that there may be limits on this sweepingly phrased principle, we cannot ignore the similarities of private businesses and public entities when they function in the marketplace.

[13] See, *e. g.*, *National League of Cities* v. *Usery*, 426 U. S., at 854, n. 18; *New York* v. *United States*, 326 U. S. 572 (1946); *United States* v. *California*, 297 U. S. 175 (1936). See also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978).

III

South Dakota, as a seller of cement, unquestionably fits the "market participant" label more comfortably than a State acting to subsidize local scrap processors. Thus, the general rule of *Alexandria Scrap* plainly applies here.[14] Petitioner argues, however, that the exemption for marketplace participation necessarily admits of exceptions. While conceding that possibility, we perceive in this case no sufficient reason to depart from the general rule.

A

In finding a Commerce Clause violation, the District Court emphasized "that the Commission . . . made an election to become part of the interstate commerce system." App. 28. The gist of this reasoning, repeated by petitioner here, is that one good turn deserves another. Having long exploited the interstate market, South Dakota should not be permitted to withdraw from it when a shortage arises. This argument is not persuasive. It is somewhat self-serving to say that South Dakota has "exploited" the interstate market. An equally fair characterization is that neighboring States long have benefited from South Dakota's foresight and industry. Viewed in this light, it is not surprising that *Alexandria Scrap* rejected an argument that the 1974 Maryland legislation challenged there was invalid because cars abandoned in Maryland had been processed in neighboring States for five years. As in *Alexandria Scrap*, we must conclude that "this chronology does not distinguish the case, for Commerce Clause purposes,

[14] The criticism received by *Alexandria Scrap* in part has been directed at its application of the proprietary immunity to state subsidy programs. See Note, 18 B. C. Ind. & Com. L. Rev. 893, 924–925 (1977). But see The Supreme Court, 1975 Term, 90 Harv. L. Rev., at 60–61. We have no occasion here to inquire whether subsidy programs unlike that involved in *Alexandria Scrap* warrant characterization as proprietary, rather than regulatory, activity. Cf. 18 B. C. Ind. & Com. L. Rev., at 913–915.

from one in which a State offered [cement] only to domestic [buyers] from the start." 426 U. S., at 809.[15]

Our rejection of petitioner's market-exploitation theory fundamentally refocuses analysis. It means that to reverse we would have to void a South Dakota "residents only" policy even if it had been enforced from the plant's very first days. Such a holding, however, would interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse. See n. 1, *supra*. A healthy regard for federalism and good government renders us reluctant to risk these results.

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

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[15] *Alexandria Scrap* explained:

"It is true that the state money initially was made available to licensed out-of-state processors as well as those located within Maryland, and not until the 1974 amendment was the financial benefit channeled, in practical effect, to domestic processors. But this chronology does not distinguish the case, for Commerce Clause purposes, from one in which a State offered bounties only to domestic processors from the start. Regardless of when the State's largesse is first confined to domestic processors, the effect upon the flow of hulks resting within the State is the same: they will tend to be processed inside the State rather than flowing to foreign processors. But no trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes their movement out of State. They remain within Maryland in response to market forces, including that exerted by money from the State." 426 U. S., at 809–810. (Footnote omitted.)

B

Undaunted by these considerations, petitioner advances four more arguments for reversal:

First, petitioner protests that South Dakota's preference for its residents responds solely to the "non-governmental objectiv[e]" of protectionism. Brief for Petitioner 25. Therefore, petitioner argues, the policy is *per se* invalid. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978).

We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.[16]

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[16] Petitioner would distinguish *Alexandria Scrap* as involving state legislation designed to advance the nonprotectionist goal of environmentalism. This characterization is an oversimplification. The challenged feature of the Maryland program—the discriminatory documentation requirement—was not aimed at improving the environment; indeed by decreasing the profit margin a hulk supplier could expect to receive if he delivered to the most accessible recycling plant, it is likely that the amendment somewhat set back the goal of encouraging hulk processing. The stated justification for the discriminatory regulation—reducing payments to out-of-state processors for recycling of hulks abandoned outside Maryland—was not even mentioned by the Court in rebuffing the Virginia processor's Commerce Clause challenge. Indeed, the central point of the Court's analysis was that demonstration of an "independent justification" was unnecessary to sustain the State's program. See Note, 18 B. C. Ind. &

Second, petitioner echoes the District Court's warning:

> "If a state in this union, were allowed to hoard its commodities or resources for the use of their own residents only, a drastic situation might evolve. For example, Pennsylvania or Wyoming might keep their coal, the northwest its timber, and the mining states their minerals. The result being that embargo may be retaliated by embargo and commerce would be halted at state lines." App. 29.

See, *e. g.*, *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U. S. 371, 385–386 (1978). This argument, although rooted in the core purpose of the Commerce Clause, does not fit the present facts. Cement is not a natural resource, like coal, timber, wild game, or minerals. Cf. *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979) (minnows); *Philadelphia* v. *New Jersey*, *supra* (landfill sites); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923) (natural gas); *West* v. *Kansas Natural Gas*

Com. L. Rev., at 927–928. At bottom, the discrimination challenged in *Alexandria Scrap* was motivated by the same concern underlying South Dakota's resident-preference policy—a desire to channel state benefits to the residents of the State supplying them. If some underlying "commendable as well as legitimate" purpose, 426 U. S., at 809, is also required, it is certainly present here. In establishing the plant, South Dakota sought the most unstartling governmental goal: improvement of the quality of life in that State by generating a supply of a previously scarce product needed for local construction and governmental improvements. A cement program, to be sure, may be a somewhat unusual or unorthodox way in which to utilize state funds to improve the quality of residents' lives. But "[a] State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. . . . A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable." *New York* v. *United States*, 326 U. S., at 591 (dissenting opinion).

Co., 221 U. S. 229 (1911) (same); Note, 32 Rutgers L. Rev. 741 (1979). It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials. South Dakota has not sought to limit access to the State's limestone or other materials used to make cement. Nor has it restricted the ability of private firms or sister States to set up plants within its borders. Tr. of Oral Arg. 4. Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement.[17] Whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here.

Third, it is suggested that the South Dakota program is infirm because it places South Dakota suppliers of ready-mix concrete at a competitive advantage in the out-of-state market; Wyoming suppliers, such as petitioner, have little chance against South Dakota suppliers who can purchase cement from the State's plant and freely sell beyond South Dakota's borders.

The force of this argument is seriously diminished, if not eliminated, by several considerations. The argument neces-

[17] Nor has South Dakota cut off access to its own cement altogether, for the policy does not bar resale of South Dakota cement to out-of-state purchasers. Although the out-of-state buyer in the secondary market will undoubtedly have to pay a markup not borne by South Dakota competitors, this result is not wholly unjust. There should be little question that South Dakota at least could exact a premium on out-of-state purchases to compensate it for the State's investment and risk in the plan. If one views the added markup paid by out-of-state buyers to South Dakota middlemen as the rough equivalent of this "premium," the challenged program equates with a permissible result. The "bottom line" of the scheme closely parallels the result in *Alexandria Scrap:* out-of-state concrete suppliers are not removed from the market altogether; to compete successfully with in-state competitors, however, they must achieve additional efficiencies or exploit natural advantages such as their location to offset the incremental advantage channeled by the State's own market behavior to in-state concrete suppliers.

sarily implies that the South Dakota scheme would be unobjectionable if sales in other States were totally barred. It therefore proves too much, for it would tolerate even a greater measure of protectionism and stifling of interstate commerce than the challenged system allows. See *K. S. B. Technical Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 75 N. J. 272, 298, 381 A. 2d 774, 787 (1977) ("It would be odd indeed to find that when a state becomes less parochial . . . its purpose becomes suspect under the Commerce Clause"). Cf. *Pike* v. *Bruce Church, Inc.*, 397 U. S., at 142 ("And the extent of the burden that will be tolerated will of course depend . . . on whether [the state interest] could be promoted as well with a lesser impact on interstate activities"). Nor is it to be forgotten that *Alexandria Scrap* approved a state program that "not only . . . effectively protect[ed] scrap processors with existing plants in Maryland from the pressures of competitors with nearby out-of-state plants, but [that] implicitly offer[ed] to extend similar protection to any competitor . . . willing to erect a scrap processing facility within Maryland's boundaries." 391 F. Supp., at 63. Finally, the competitive plight of out-of-state ready-mix suppliers cannot be laid solely at the feet of South Dakota. It is attributable as well to their own States' not providing or attracting alternative sources of supply and to the suppliers' own failure to guard against shortages by executing long-term supply contracts with the South Dakota plant.

In its last argument, petitioner urges that, had South Dakota not acted, free market forces would have generated an appropriate level of supply at free market prices for all buyers in the region. Having replaced free market forces, South Dakota should be forced to replicate how the free market would have operated under prevailing conditions.

This argument appears to us to be simplistic and speculative. The very reason South Dakota built its plant was because the free market had failed adequately to supply the

region with cement. See n. 1, *supra*. There is no indication, and no way to know, that private industry would have moved into petitioner's market area, and would have ensured a supply of cement to petitioner either prior to or during the 1978 construction season. Indeed, it is quite possible that petitioner would never have existed—far less operated successfully for 20 years—had it not been for South Dakota cement.[18]

C

We conclude, then, that the arguments for invalidating South Dakota's resident-preference program are weak at best. Whatever residual force inheres in them is more than offset by countervailing considerations of policy and fairness. Reversal would discourage similar state projects, even though this project demonstrably has served the needs of state residents and has helped the entire region for more than a half century. Reversal also would rob South Dakota of the intended benefit of its foresight, risk, and industry.[19] Under

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[18] Petitioner also seeks to distinguish *Alexandria Scrap* on the ground that there, unlike here, the State "created" the relevant market. See 426 U. S., at 814–817 (concurring opinion). It is clear, however, that *Alexandria Scrap* could not, and did not, rest on the notion that Maryland had created the interstate market in hulks. *Id.*, at 809, n. 18. See *id.*, at 824–826, n. 6 (dissenting opinion); Note, 18 B. C. Ind. & Com. L. Rev., at 927; The Supreme Court, 1975 Term, 90 Harv. L. Rev., at 62, n. 27; Note, 34 Wash. & Lee L. Rev. 979, 995 (1977).

[19] The risk borne by South Dakota in establishing the cement plant is not to be underestimated. As explained in n. 1, *supra*, the cement plant was one of several projects through which the Progressive state government sought to deal with local problems. The fate of other similar projects illustrates the risk borne by South Dakota taxpayers in setting up the cement plant at a cost of some $2 million. Thus, "[t]he coal mine was sold in early 1934 for $5,500 with an estimated loss of nearly $175,000 for its fourteen years of operation. The 1933 Legislature also liquidated the state bonding department and the state hail insurance project. The total loss to the taxpayers from the latter venture was approximately $265,000." H. Schell, History of South Dakota 286 (3d ed. 1975).

these circumstances, there is no reason to depart from the general rule of *Alexandria Scrap.*

The judgment of the United States Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE STEVENS join, dissenting.

The South Dakota Cement Commission has ordered that in times of shortage the state cement plant must turn away out-of-state customers until all orders from South Dakotans are filled. This policy represents precisely the kind of economic protectionism that the Commerce Clause was intended to prevent.[1] The Court, however, finds no violation of the Commerce Clause, solely because the State produces the cement. I agree with the Court that the State of South Dakota may provide cement for its public needs without violating the Commerce Clause. But I cannot agree that South Dakota may withhold its cement from interstate commerce in order to benefit private citizens and businesses within the State.

I

The need to ensure unrestricted trade among the States created a major impetus for the drafting of the Constitution. "The power over commerce . . . was one of the primary objects for which the people of America adopted their government. . . ." *Gibbons* v. *Ogden,* 9 Wheat. 1, 190 (1824). Indeed, the Constitutional Convention was called after an earlier convention on trade and commercial problems proved inconclusive. C. Beard, An Economic Interpretation of the

[1] By "protectionism," I refer to state policies designed to protect private economic interests within the State from the forces of the interstate market. I would exclude from this term policies relating to traditional governmental functions, such as education, and subsidy programs like the one at issue in *Hughes* v. *Alexandria Scrap Corp.,* 426 U. S. 794 (1976). See *infra,* at 451–453.

Constitution 61–63 (1935); S. Bloom, History of the Formation of the Union Under the Constitution 14–15 (1940). In the subsequent debate over ratification, Alexander Hamilton emphasized the importance of unrestricted interstate commerce:

> "An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions. . . . Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails . . . it can call to its aid the staple of another." The Federalist, No. 11, p. 71 (J. Cooke ed., 1961) (A. Hamilton); see *id.*, No. 42, p. 283 (J. Madison).

The Commerce Clause has proved an effective weapon against protectionism. The Court has used it to strike down limitations on access to local goods, be they animal, *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979) (minnows); vegetable, *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970) (cantaloupes); or mineral, *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923) (natural gas). Only this Term, the Court held unconstitutional a Florida statute designed to exclude out-of-state investment advisers. *Lewis* v. *BT Investment Managers, Inc.*, *ante*, p. 27. As we observed in *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 803 (1976), "this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand."

This case presents a novel constitutional question. The Commerce Clause would bar legislation imposing on private parties the type of restraint on commerce adopted by South Dakota. See *Pennsylvania* v. *West Virginia*, *supra*; cf. *Great A&P Tea Co.* v. *Cottrell*, 424 U. S. 366 (1976); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928).[2] Conversely,

[2] The Court attempts to distinguish prior decisions that address the Commerce Clause limitations on a State's regulation of natural resource

a private business constitutionally could adopt a marketing policy that excluded customers who come from another State. This case falls between those polar situations. The State, through its Commission, engages in a commercial enterprise and restricts its own interstate distribution. The question is whether the Commission's policy should be treated like state regulation of private parties or like the marketing policy of a private business.

The application of the Commerce Clause to this case should turn on the nature of the governmental activity involved. If a public enterprise undertakes an "integral operatio[n] in areas of traditional governmental functions," *National League of Cities* v. *Usery*, 426 U. S. 833, 852 (1976), the Commerce Clause is not directly relevant. If, however, the State enters

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exploitation. *E. g., Hughes* v. *Oklahoma*, 441 U. S. 322 (1979); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923). The Court contends that cement production, unlike the activities involved in those cases, "is the end product of a complex process whereby a costly physical plant and human labor act on raw materials." *Ante*, at 444. The Court's distinction fails in two respects. First, the principles articulated in the natural resources cases also have been applied in decisions involving agricultural production, notably milk processing. *E. g., H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525 (1949); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). More fundamentally, the Court's definition of cement production describes all sophisticated economic activity, including the exploitation of natural resources. The extraction of natural gas, for example, could hardly occur except through a "complex process whereby a costly physical plant and human labor act on raw materials."

The Court also suggests that the Commerce Clause has no application to this case because South Dakota does not "posses[s] unique access to the materials needed to produce cement." *Ante*, at 444. But in its regional market, South Dakota has unique access to *cement*. A cutoff in cement sales has the same economic impact as a refusal to sell resources like natural gas. Customers can seek other sources of supply, or find a substitute product, or do without. Regardless of the nature of the product the State hoards, the consumer has been denied the guarantee of the Commerce Clause that he "may look to . . . free competition from every producing area in the Nation to protect him from exploitation by any." *H. P. Hood & Sons* v. *Du Mond*, *supra*, at 539.

the private market and operates a commercial enterprise for the advantage of its private citizens, it may not evade the constitutional policy against economic Balkanization.

This distinction derives from the power of governments to supply their own needs, see *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127 (1940); *Atkin* v. *Kansas*, 191 U. S. 207 (1903), and from the purpose of the Commerce Clause itself, which is designed to protect "the natural functioning of the interstate market," *Hughes* v. *Alexandria Scrap Corp.*, *supra*, at 806. In procuring goods and services for the operation of government, a State may act without regard to the private marketplace and remove itself from the reach of the Commerce Clause. See *American Yearbook Co.* v. *Askew*, 339 F. Supp. 719 (MD Fla.), summarily aff'd, 409 U. S. 904 (1972). But when a State itself becomes a participant in the private market for other purposes, the Constitution forbids actions that would impede the flow of interstate commerce. These categories recognize no more than the "constitutional line between the State as government and the State as trader." *New York* v. *United States*, 326 U. S. 572, 579 (1946); see *United States* v. *California*, 297 U. S. 175 (1936); *Ohio* v. *Helvering*, 292 U. S. 360 (1934); *South Carolina* v. *United States*, 199 U. S. 437 (1905).

The Court holds that South Dakota, like a private business, should not be governed by the Commerce Clause when it enters the private market. But precisely because South Dakota is a State, it cannot be presumed to behave like an enterprise "'engaged in an entirely private business.'" See *ante*, at 439, quoting *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919). A State frequently will respond to market conditions on the basis of political rather than economic concerns. To use the Court's terms, a State may attempt to act as a "market regulator" rather than a "market participant." See *ante*, at 436. In that situation, it is a pretense to equate the State with a private economic actor. State action burdening interstate trade is no less state action because it is

accomplished by a public agency authorized to participate in the private market.

II

The threshold issue is whether South Dakota has undertaken integral government operations in an area of traditional governmental functions, or whether it has participated in the marketplace as a private firm. If the latter characterization applies, we also must determine whether the State Commission's marketing policy burdens the flow of interstate trade. This analysis highlights the differences between the state action here and that before the Court in *Hughes* v. *Alexandria Scrap Corp.*

A

In *Alexandria Scrap*, a Virginia scrap processor challenged a Maryland program to pay bounties for every junk car registered in Maryland that was converted into scrap. The program imposed more onerous documentation standards on non-Maryland processors, thereby diverting Maryland "hulks" to in-state processors. The Virginia plaintiff argued that this diversion burdened interstate commerce.

As the Court today notes, *Alexandria Scrap* determined that Maryland's bounty program constituted direct state participation in the market for automobile hulks. *Ante*, at 435. But the critical question—the second step in the opinion's analysis—was whether the bounty program constituted an impermissible burden on interstate commerce. Recognizing that the case did not fit neatly into conventional Commerce Clause theory, 426 U. S., at 807, we found no burden on commerce.

The Court first observed:

> "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price. There has been an impact upon the interstate flow of hulks only because . . . Maryland effectively

has made it more lucrative for unlicensed suppliers to dispose of their hulks in Maryland. . . ." *Id.*, at 806.

We further stated "that the novelty of this case is not its presentation of a new form of 'burden' upon commerce, but that appellee should characterize Maryland's action as a burden which the Commerce Clause was intended to make suspect." *Id.*, at 807. The opinion then emphasized that "no trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes th[e] movement [of hulks] out of State." *Id.*, at 809–810. Rather, the hulks "remain within Maryland in response to market forces, including that exerted by money from the State." *Id.*, at 810. The Court concluded that the subsidies provided under the Maryland program erected no barriers to trade. Consequently, the Commerce Clause did not forbid the Maryland program.

B

Unlike the market subsidies at issue in *Alexandria Scrap*, the marketing policy of the South Dakota Cement Commission has cut off interstate trade.[3] The State can raise such a bar when it enters the market to supply its own needs. In order to ensure an adequate supply of cement for public uses, the State can withhold from interstate commerce the cement needed for public projects. Cf. *National League of Cities* v. *Usery*, *supra*.

The State, however, has no parallel justification for favoring private, in-state customers over out-of-state customers.[4]

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[3] One distinction between a private and a governmental function is whether the activity is supported with general tax funds, as was the case for the reprocessing program in *Alexandria Scrap*, or whether it is financed by the revenues it generates. In this case, South Dakota's cement plant has supported itself for many years. See Tr. of Oral Arg. 27. There is thus no need to consider the question whether a state-subsidized business could confine its sales to local residents.

[4] The consequences of South Dakota's "residents-first" policy were devastating to petitioner Reeves, Inc., a Wyoming firm. For 20 years,

In response to political concerns that likely would be inconsequential to a private cement producer, South Dakota has shut off its cement sales to customers beyond its borders. That discrimination constitutes a direct barrier to trade "of the type forbidden by the Commerce Clause, and involved in previous cases. . . ." *Alexandria Scrap*, 426 U. S., at 810. The effect on interstate trade is the same as if the state legislature had imposed the policy on private cement producers. The Commerce Clause prohibits this severe restraint on commerce.

III

I share the Court's desire to preserve state sovereignty. But the Commerce Clause long has been recognized as a limitation on that sovereignty, consciously designed to maintain a national market and defeat economic provincialism. The Court today approves protectionist state policies. In the absence of contrary congressional action,[5] those policies now can be implemented as long as the State itself directly participates in the market.[6]

By enforcing the Commerce Clause in this case, the Court would work no unfairness on the people of South Dakota. They still could reserve cement for public projects and share in whatever return the plant generated. They could not, how-

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Reeves had purchased about 95% of its cement from the South Dakota plant. When the State imposed its preference for South Dakota residents in 1978, Reeves had to reduce its production by over 75%. *Ante*, at 432–433. As a result, its South Dakota competitors were in a vastly superior position to compete for work in the region.

[5] The Court explicitly does not exclude the possibility that, under the Commerce Clause, Congress might legislate against protectionist state policies. See *ante*, at 435–436.

[6] Since the Court's decision contains no limiting principles, a State will be able to manufacture any commercial product and withhold it from citizens of other States. This prerogative could extend, for example, to pharmaceutical goods, food products, or even synthetic or processed energy sources.

ever, use the power of the State to furnish themselves with cement forbidden to the people of neighboring States.

The creation of a free national economy was a major goal of the States when they resolved to unite under the Federal Constitution. The decision today cannot be reconciled with that purpose.

Syllabus

CAREY, STATE'S ATTORNEY OF COOK COUNTY *v.* BROWN ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-703. Argued April 15, 1980—Decided June 20, 1980

An Illinois statute generally prohibits picketing of residences or dwellings, but exempts from its prohibition peaceful picketing of a place of employment involved in a labor dispute. Appellees were convicted in state court of violating this statute when they picketed the Mayor of Chicago's home in protest against his alleged failure to support the busing of schoolchildren to achieve racial integration. Thereafter, appellees brought suit in Federal District Court, seeking a declaratory judgment that the statute is unconstitutional on its face and as applied, and an injunction prohibiting appellant and other state and local officials from enforcing the statute. The District Court denied all relief, but the Court of Appeals reversed, holding that the statute, both on its face and as applied to appellees, violated the Equal Protection Clause of the Fourteenth Amendment.

Held: The Illinois statute is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment since it makes an impermissible distinction between peaceful labor picketing and other peaceful picketing. *Police Department of Chicago* v. *Mosley*, 408 U. S. 92. Pp. 459–471.

(a) In prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the statute regulates expressive conduct that falls within the First Amendment's preserve, and, in exempting peaceful labor picketing from its general prohibition, the statute discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communication. On its face, the statute accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated but discussion of all other issues is restricted. The permissibility of residential picketing is thus dependent solely on the nature of the message being conveyed. Pp. 459–463.

(b) Standing alone, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute. The statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. More fundamentally, the exclusion of labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that

nothing in the content-based labor-nonlabor distinction has any bearing on privacy. Pp. 464–465.

(c) Similarly, the State's interest in providing special protection for labor protests cannot, without more, justify the labor picketing exemption. Labor picketing is no more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which appellees wished to demonstrate. Pp. 466–467.

(d) Nor can the statute be justified as an attempt to accommodate the competing rights of the homeowner to enjoy his privacy and the employee to demonstrate over labor disputes, since such an attempt hinges on the validity of both of these goals, the latter of which—the desire to favor one form of speech over all others—is illegitimate. Likewise, the statute cannot be justified as an attempt to prohibit picketing that would impinge on residential privacy while permitting picketing that would not. Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests, and numerous other actions of a homeowner might constitute "nonresidential" uses of his property and would thus serve to vitiate the right to residential privacy. Pp. 467–469.

(e) While the State's interest in protecting the well-being, tranquility, and privacy of the home is of the highest order, the crucial question is whether the statute advances that objective in a manner consistent with the Equal Protection Clause. Because the statute discriminates among pickets based on the subject matter of their expression, the answer to that question must be "No." Pp. 470–471.

602 F. 2d 791, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 471. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 472.

Ellen G. Robinson argued the cause *pro hac vice* for appellant. With her on the briefs were *Bernard Carey, pro se*, and *Paul P. Biebel, Jr.*

Edward Burke Arnolds argued the cause for appellees. With him on the brief was *Michael P. Seng.**

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*Briefs of *amici curiae* urging reversal were filed by *William W. Becker*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

At issue in this case is the constitutionality under the First and Fourteenth Amendments of a state statute that generally bars picketing of residences or dwellings, but exempts from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute."

I

On September 6, 1977, several of the appellees, all of whom are members of a civil rights organization entitled the Committee Against Racism, participated in a peaceful demonstration on the public sidewalk in front of the home of Michael Bilandic, then Mayor of Chicago, protesting his alleged failure to support the busing of schoolchildren to achieve racial integration. They were arrested and charged with unlawful residential picketing in violation of Ill. Rev. Stat., ch. 38, § 21.1–2 (1977), which provides:

> "It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest." [1]

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for the New England Legal Foundation; and by *Ronald A. Zumbrun, Robert K. Best,* and *Robin L. Rivett* for the Pacific Legal Foundation et al.

Howard Eglit and *David Goldberger* filed a brief for the Roger Baldwin Foundation of ACLU, Inc., as *amicus curiae* urging affirmance.

[1] A violation of § 21.1–2 is a "Class B" misdemeanor punishable by a fine of up to $500 and imprisonment for not more than six months. See Ill. Rev. Stat., ch. 38, §§ 21.1–3, 1005–8–3, 1005–9–1 (1977).

At least four other States have enacted antiresidential picketing laws similar in form to this statute. See Ark. Stat. Ann. §§ 41–2966 to 41–2968 (1977); Conn. Gen. Stat. § 31–120 (1979); Haw. Rev. Stat. § 379A–1 (1976); Md. Ann. Code, Art. 27, § 580A (1976). Connecticut's law has

Appellees pleaded guilty to the charge and were sentenced to periods of supervision ranging from six months to a year.

In April 1978, appellees commenced this lawsuit in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that the Illinois residential picketing statute is unconstitutional on its face and as applied, and an injunction prohibiting defendants—various state, county, and city officials—from enforcing the statute. Appellees did not attempt to attack collaterally their earlier state-court convictions, but requested only prospective relief. Alleging that they wished to renew their picketing in residential neighborhoods but were inhibited from doing so by the threat of criminal prosecution under the residential picketing statute, appellees challenged the Act under the First and Fourteenth Amendments as an overbroad, vague, and, in light of the exception for labor picketing, impermissible content-based restriction on protected expression. The District Court, ruling on cross-motions for summary judgment, denied all relief. *Brown* v. *Scott*, 462 F. Supp. 518 (1978).

The Court of Appeals for the Seventh Circuit reversed. *Brown* v. *Scott*, 602 F. 2d 791 (1979). Discerning "no principled basis" for distinguishing the Illinois statute from a similar picketing prohibition invalidated in *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972), the court concluded that the Act's differential treatment of labor and nonlabor picketing could not be justified either by the important state

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been construed to permit all picketing in a residential area except for labor picketing that is not conducted at the situs of a labor dispute. *State* v. *Anonymous*, 6 Conn. Cir. 372, 274 A. 2d 897 (App. Div. 1970); *DeGregory* v. *Giesing*, 427 F. Supp. 910 (Conn. 1977) (three-judge court). The Maryland statute was declared unconstitutional by the Maryland Court of Appeals in *State* v. *Schuller*, 280 Md. 305, 372 A. 2d 1076 (1977). See also *People Acting Through Community Effort* v. *Doorley*, 468 F. 2d 1143 (CA1 1972) (invalidating municipal ordinance virtually identical to the Illinois residential picketing statute); but see *Wauwatosa* v. *King*, 49 Wis. 2d 398, 182 N. W. 2d 530 (1971) (upholding validity of similar ordinance).

interest in protecting the peace and privacy of the home or by the special character of a residence that is also used as a "place of employment." Accordingly, the court held that the statute, both on its face and as applied to appellees, violated the Equal Protection Clause of the Fourteenth Amendment.[2] We noted probable jurisdiction. 444 U. S. 1011 (1980). We affirm.

II

As the Court of Appeals observed, this is not the first instance in which this Court has had occasion to consider the constitutionality of an enactment selectively proscribing peaceful picketing on the basis of the placard's message. *Police Department of Chicago* v. *Mosley, supra,* arose out of a challenge to a Chicago ordinance that prohibited picketing in front of any school other than one "involved in a labor dispute."[3] We held that the ordinance violated the Equal Protection Clause because it impermissibly distinguished between labor picketing and all other peaceful picketing with-

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[2] Because the Court of Appeals concluded that the labor dispute exception was not severable from the remainder of the statute, it invalidated the enactment in its entirety. Cf. *State* v. *Schuller, supra,* at 318–321, 372 A. 2d, at 1083–1084. The court therefore found it unnecessary to consider the constitutionality under the First Amendment of a statute that prohibited all residential picketing. *Brown* v. *Scott,* 602 F. 2d 791, 795, n. 6 (1979). Because we find the present statute defective on equal protection principles, we likewise do not consider whether a statute barring all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments.

[3] Chicago Municipal Code, ch. 193–1 (i) (1968), provided:

"A person commits disorderly conduct when he knowingly:

. . . . . .

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, *provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute. . . .*" (Emphasis supplied.)

out any showing that the latter was "clearly more disruptive" than the former. 408 U. S., at 100. Like the Court of Appeals, we find the Illinois residential picketing statute at issue in the present case constitutionally indistinguishable from the ordinance invalidated in *Mosley*.

There can be no doubt that in prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the Illinois statute regulates expressive conduct that falls within the First Amendment's preserve. See, *e. g.*, *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Gregory* v. *Chicago*, 394 U. S. 111, 112 (1969); *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 152 (1969). "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.). "'[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.'" *Hudgens* v. *NLRB*, 424 U. S. 507, 515 (1976) (quoting *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, 315 (1968)).

Nor can it be seriously disputed that in exempting from its general prohibition only the "peaceful picketing of a place of employment involved in a labor dispute," the Illinois statute discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communication.[4] On

[4] The Illinois residential picketing statute apparently has not been construed by the state courts. Throughout this litigation, however, all parties and the courts below have interpreted the statutory exception for "peaceful picketing of a place of employment involved in a labor dispute" as embodying the additional requirement that the subject of the picketing be related to the ongoing labor dispute. *Police Department of Chicago* v.

its face, the Act accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted. The permissibility of residential picketing under the Illinois statute is thus dependent solely on the nature of the message being conveyed.[5]

In these critical respects, then, the Illinois statute is identical to the ordinance in *Mosley*, and it suffers from the same constitutional infirmities. When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the jus-

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Mosley, 408 U. S. 92 (1972), was premised upon an identical construction. See *id.*, at 94, n. 2 (statutory exemption for "the peaceful picketing of any school involved in a labor dispute" applies only to *labor* picketing of a school involved in such a dispute).

[5] The District Court read the labor exception in this statute as creating two separate classifications: one between "places of employment" and all other "residences," and a second between "places of employment involved in a labor dispute" and "places of employment *not* involved in a labor dispute." The court held that the first classification was a permissible content-neutral regulation of the location of picketing. And although recognizing that the second distinction may well be based on the subject matter of the demonstration, see n. 4, *supra*, the court held that appellees lacked standing to challenge it because they were not seeking to picket "a place of employment," and thus would not have benefitted from a determination that the second classification was unconstitutional. *Brown* v. *Scott*, 462 F. Supp. 518, 534–535 (1978).

The Court of Appeals, in reversing the District Court, refused to adopt the lower court's interpretation of the statute. Rather, it read the "place of employment" exception to divide "residences and dwellings" into but two categories—those at which picketing is lawful (*i. e.*, all places of employment involved in labor disputes) and those at which it is unlawful (*i. e.*, all other residences and dwellings). *Brown* v. *Scott*, 602 F. 2d, at 793–794. We accept the construction of the Court of Appeals. Appellees sought to picket at a residence and were denied permission to do so. They clearly have standing to attack the statutory classification on which that denial was premised. Indeed, appellant does not challenge the Court of Appeals' interpretation of the statute, Tr. of Oral Arg. 13, and he concedes that this restriction is content-based, *id.*, at 21.

tifications offered for any distinctions it draws must be carefully scrutinized. *Police Department of Chicago* v. *Mosley*, 408 U. S., at 98–99, 101; see *United States* v. *O'Brien*, 391 U. S. 367, 376–377 (1968); *Williams* v. *Rhodes*, 393 U. S. 23, 30–31 (1968); *Dunn* v. *Blumstein*, 405 U. S. 330, 342–343 (1972); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 34, n. 75 (1973). As we explained in *Mosley*: "Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. Such excesses 'can be controlled by narrowly drawn statutes,' *Saia* v. *New York*, 334 U. S., at 562, focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter." 408 U. S., at 101–102. Yet here, under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home.

Moreover, it is the content of the speech that determines whether it is within or without the statute's blunt prohibition.[6] What we said in *Mosley* has equal force in the present case:

> "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. . . . Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to

[6] It is, of course, no answer to assert that the Illinois statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co.* v. *Public Service Comm'n*, *post*, at 537.

the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co.* v. *Sullivan,* [376 U. S. 254], 270.

"Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.,* at 95–96 (citations and footnote omitted).[7]

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[7] *Mosley* was neither the Court's first nor its last pronouncement that the First and Fourteenth Amendments forbid discrimination in the regulation of expression on the basis of the content of that expression. See *Cox* v. *Louisiana,* 379 U. S. 536, 581 (1965) (Black, J., concurring):

"Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited. But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment."

See also *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 209, 215 (1975); *Hudgens* v. *NLRB,* 424 U. S. 507, 520 (1976); *Madison Joint School*

III

Appellant nonetheless contends that this case is distinguishable from *Mosley*. He argues that the state interests here are especially compelling and particularly well served by a statute that accords differential treatment to labor and nonlabor picketing. We explore in turn each of these interests, and the manner in which they are said to be furthered by this statute.

A

Appellant explains that whereas the Chicago ordinance sought to prevent disruption of the schools, concededly a "substantial" and "legitimate" governmental concern, see *id.*, at 99, 100, the Illinois statute was enacted to ensure privacy in the home, a right which appellant views as paramount in our constitutional scheme.[8] For this reason, he contends that the same content-based distinctions held invalid in the *Mosley* context may be upheld in the present case.

We find it unnecessary, however, to consider whether the State's interest in residential privacy outranks its interest in quiet schools in the hierarchy of societal values. For even

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District No. 8 v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 175–176 (1976); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784–785 (1978); *Consolidated Edison Co.* v. *Public Service Comm'n*, *post*, at 536–538.

[8] The importance which the State attaches to the interest in maintaining residential privacy is reflected in the Illinois Legislature's finding accompanying the residential picketing statute:

"The Legislature finds and declares that men in a free society have the right to quiet enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life; that residential picketing is inappropriate in our society, where the jealously guarded rights of free speech and assembly have always been associated with respect for the rights of others. For these reasons the Legislature finds and declares this Article to be necessary." Ill. Rev. Stat., ch. 38, § 21.1–1 (1977).

the most legitimate goal may not be advanced in a constitutionally impermissible manner. And though we might agree that certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction—if narrowly drawn—would be a permissible way of furthering those objectives, cf. *Schenck* v. *United States*, 249 U. S. 47 (1919), this is not such a case.

First, the generalized classification which the statute draws suggests that Illinois itself has determined that residential privacy is not a transcendent objective: While broadly permitting all peaceful labor picketing notwithstanding the disturbances it would undoubtedly engender, the statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. The apparent overinclusiveness and underinclusiveness of the statute's restriction would seem largely to undermine appellant's claim that the prohibition of all nonlabor picketing can be justified by reference to the State's interest in maintaining domestic tranquility.[9]

More fundamentally, the exclusion for labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy. Appellant can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern. Standing alone, then, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute.

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[9] Cf. Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 29 (quoted in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 67, n. 27 (1976) (opinion of STEVENS, J.)): "If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached." See also *Police Department of Chicago* v. *Mosley*, 408 U. S., at 100; *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 638–639 (1980).

B

The second important objective advanced by appellant in support of the statute is the State's interest in providing special protection for labor protests. He maintains that federal [10] and state [11] law has long exhibited an unusual concern for such activities, and he contends that this solicitude may be furthered by a narrowly drawn exemption for labor picketing.

The central difficulty with this argument is that it forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which these appellees wish to demonstrate. We reject that proposition. Cf. T. Emerson, The System of Freedom of Expression 444–449 (1970) (suggesting that nonlabor picketing is more akin to pure expression than labor picketing and thus should be subject to fewer restrictions). Public-issue picketing, "an exercise of . . . basic constitutional rights in their most pristine and classic form,"

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[10] See generally 29 U. S. C. § 141 *et seq.*; *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *AFL* v. *Swing*, 312 U. S. 321 (1941). Appellant does not go so far as to suggest that the National Labor Relations Act preempts the State from enacting a law prohibiting the picketing of residences involved in labor disputes. Such an argument has dubious merit. See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 136, and n. 2 (1976).

[11] See Ill. Rev. Stat., ch. 48, § 2a (1977), which provides:

"No restraining order or injunction shall be granted by any court of this State . . . in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, . . . from peaceably and without threats or intimidation being upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do."

Edwards v. *South Carolina*, 372 U. S. 229, 235 (1963), has always rested on the highest rung of the hierarchy of First Amendment values: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California*, 283 U. S. 359, 369 (1931). See generally A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). While the State's motivation in protecting the First Amendment rights of employees involved in labor disputes is commendable, that factor, without more, cannot justify the labor picketing exemption.

C

Appellant's final contention is that the statute can be justified by some combination of the preceding objectives. This argument is fashioned on two different levels. In its elemental formulation, it posits simply that a distinction between labor and nonlabor picketing is uniquely suited to furthering the legislative judgment that residential privacy should be preserved to the greatest extent possible without also compromising the special protection owing to labor picketing. In short, the statute is viewed as a reasonable attempt to accommodate the competing rights of the homeowner to enjoy his privacy and the employee to demonstrate over labor disputes.[12]

[12] We note that the statute's labor dispute exemption is overbroad in this respect, for it not only protects the rights of the employee to picket the residence of his employer, but it also permits third parties to picket both the employer and his employee, even when there is no dispute between those individuals. As appellant's counsel explained at oral argument: "[T]he labor dispute could exist even if the employee wasn't part of the dispute. For example, if you have a condominium that employs non-union janitors and the non-union janitor is perfectly happy to be there, conceivably union janitors could engage in picketing, very much like a traditional labor law case." Tr. of Oral Arg. 14.

But this attempt to justify the statute hinges on the validity of both of these goals, and we have already concluded that the latter—the desire to favor one form of speech over all others—is illegitimate.

The second and more complex formulation of appellant's position characterizes the statute as a carefully drafted attempt to prohibit that picketing which would impinge on residential privacy while permitting that picketing which would not. In essence, appellant asserts that the exception for labor picketing does not contravene the State's interest in preserving residential tranquility because of the unique character of a residence that is a "place of employment." By "inviting" a worker into his home and converting that dwelling into a place of employment, the argument goes, the resident has diluted his entitlement to total privacy. In other words, he has "waived" his right to be free from picketing with respect to disputes arising out of the employment relationship, thereby justifying the statute's narrow labor exception at those locations.[13]

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[13] An alternative justification for the statute—one not pressed by appellant—is that it is intended to protect privacy in the home, but only insofar as that objective can be accomplished without prohibiting those forms of speech that are peculiarly appropriate to residential neighborhoods *and cannot effectively be exercised elsewhere*. Since labor picketing arising out of disputes occurring in residential neighborhoods can only be carried out in those neighborhoods, the argument would continue, it is permitted under the statute while other forms of picketing, for which suitable alternative forums will generally exist, are barred.

Even assuming that a content-based distinction might in some cases be permissible on these grounds, but see *Schneider* v. *State*, 308 U. S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"), this is not such a case because the Illinois statute is seriously underinclusive in this respect. It singles out for special protection only one of the many sorts of picketing which must be carried out in residential neighborhoods or not at all. Protests arising out of landlord-tenant relationships, zoning disputes, and historic preservation issues are just some

The flaw in this argument is that it proves too little. Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests,[14] and numerous other actions of a homeowner might constitute "nonresidential" uses of his property and would thus serve to vitiate the right to residential privacy. For example, the resident who prominently decorates his windows and front yard with posters promoting the qualifications of one candidate for political office might be said to "invite" a counter-demonstration from supporters of an opposing candidate. Similarly, a county chairman who uses his home to meet with his district captains and to discuss some controversial issue might well expect that those who are deeply concerned about the decision the chairman will ultimately reach would want to make their views known by demonstrating outside his home during the meeting. And, with particular regard to the facts of the instant case, it borders on the frivolous to suggest that a resident who invites a repairman into his home to fix his television set has "waived" his right to privacy with respect to a dispute between the repairman and the local union,[15] but that the official who has voluntarily chosen to enter the public arena has not likewise "waived" his right to privacy with respect to a challenge to his views on significant issues of social and economic policy.[16]

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of the many demonstrations that bear a direct relation to residential neighborhoods. See generally Comment, Picketers at the Doorstep, 9 Harv. Civ. Rights—Civ. Lib. L. Rev. 95, 101–102, 106 (1974). Indeed, appellees themselves assert that they want to engage in residential picketing because it is the only effective means they have of communicating their concern about the issue of busing to the desired neighborhood audience. Yet the Illinois statute bars all of these groups from picketing in residential areas while those wishing to picket at the site of a labor dispute are permitted to do so.

[14] See *supra*, at 461–462.

[15] See n. 12, *supra*.

[16] Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

IV

We therefore conclude that appellant has not successfully distinguished *Mosley*. We are not to be understood to imply, however, that residential picketing is beyond the reach of uniform and nondiscriminatory regulation. For the right to communicate is not limitless. *E. g., Cox* v. *Louisiana*, 379 U. S. 536, 554–555 (1965); *Cox* v. *Louisiana*, 379 U. S. 559, 563–564 (1965).[17] Even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities, see, *e. g., ibid.* (picketing or parading prohibited near courthouses); *Adderley* v. *Florida*, 385 U. S. 39 (1966) (demonstrations prohibited on jailhouse grounds), or when it is directed toward an illegal purpose, see, *e. g., Teamsters* v. *Vogt, Inc.*, 354 U. S. 284 (1957) (prohibition of picketing directed toward achieving "union shop" in violation of state law).

Moreover, we have often declared that "[a] state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech *irrespective of content.*" *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209 (1975) (emphasis supplied). See, *e. g., Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953); *Cox* v. *Louisiana*, 379 U. S., at 554; *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972). In sum, "no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes,

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[17] Mr. Justice Goldberg's opinion for the Court in the first *Cox* case stated: "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." 379 U. S., at 554.

wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals." *Gregory* v. *Chicago*, 394 U. S. 111, 118 (1969) (Black, J., concurring).

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick." *Id.*, at 125 (Black, J., concurring). See generally *Stanley* v. *Georgia*, 394 U. S. 557 (1969); *Rowan* v. *United States Post Office Dept.*, 397 U. S. 728 (1970); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978); *Payton* v. *New York*, 445 U. S. 573 (1980). The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. " 'The crucial question, however, is whether [the Illinois' statute] advances that objective in a manner consistent with the command of the Equal Protection Clause.' *Reed* v. *Reed*, 404 U. S. [71], 76 [(1971)]." *Police Department of Chicago* v. *Mosley*, 408 U. S., at 99. And because the statute discriminates among pickets based on the subject matter of their expression, the answer must be "No."

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART, concurring.

The opinion of the Court in this case, as did the Court's opinion in *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, invokes the Equal Protection Clause of the Fourteenth Amendment as the basis of decision. But what was actually at stake in *Mosley*, and is at stake here, is the basic meaning of the constitutional protection of free speech:

> "[W]hile a municipality may constitutionally impose reasonable time, place, and manner regulations on the

> use of its streets and sidewalks for First Amendment purposes, and may even forbid altogether such use of some of its facilities; what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression." *Hudgens* v. *NLRB*, 424 U. S. 507, 520. (Citations omitted.)

It is upon this understanding that I join the opinion and judgment of the Court.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

I address the merits of the Court's constitutional decision first, although I also seriously question the appellees' standing to assert the grounds for invalidity on which the Court apparently relies.[1] One who reads the opinion of the Court is probably left with the impression that Illinois has enacted a residential picketing statute which reads: "All residential picketing, except for labor picketing, is prohibited." Such an

[1] The Court premises its finding that the appellees have standing to challenge the statute at least in part on the basis of the appellant's "concessions" at oral argument that the State was not persisting in its challenge to appellees' standing in this Court. See *ante*, at 461, n. 5. But we have said that "[w]e are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 170 (1972). Moreover, while appellant may have chosen not to challenge appellees' standing to argue that they had been denied equal protection under the statute, appellant certainly did not concede that appellees had standing to argue that other individuals desiring to picket under circumstances dissimilar to appellees might be denied equal protection under the statute. In fact, counsel quite explicitly stated that the Court should only consider the constitutionality of prohibiting the appellees' conduct: "I would urge that the . . . First Amendment question only be as applied to the plaintiffs, to the conduct that the plaintiffs actually engaged in. . . ." Tr. of Oral Arg. 17. And this is the standing question that is implicated by the Court's opinion. See *infra*, at 486–489.

impression is entirely understandable; indeed, it is created by the Court's own phrasing throughout the opinion. The Court asserts that Illinois, "in exempting from its general prohibition *only* the 'peaceful picketing of a place of employment involved in a labor dispute,' . . . discriminates between lawful and unlawful conduct based upon . . . content. . . ." (Emphasis added.) *Ante*, at 460. It states that "information about labor disputes may be freely disseminated, but discussion of all other issues is restricted." *Ante*, at 461. The Court finds that the permissibility of residential picketing in Illinois is dependent "*solely* on the nature of the message being conveyed." *Ibid.* (Emphasis added.) And again the Court states that "Illinois has flatly prohibited all nonlabor picketing" while the statute is said to "broadly permi[t] all peaceful labor picketing." *Ante*, at 462, 465.

Dissenting opinions are more likely than not to quarrel with the Court's exposition of the law, but my initial quarrel is with the accuracy of the Court's paraphrasing and selective quotation from the Illinois statute. The complete language of the statute, set out accurately in the text of the Court's opinion, reveals a legislative scheme quite different from that described by the Court in its narrative paraphrasing of the enactment.[2]

The statute provides that residential picketing is prohibited, but goes on to exempt four categories of residences from this general ban. *First*, if the residence is used as a "place

[2] The simplistic construction of the statute reflected in the Court's opinion apparently is also justified by supposed "concessions" of appellant's counsel at oral argument. *Ante*, at 461, n. 5. Appellant, however, has never suggested that the statute regulates picketing solely by permitting labor, but not nonlabor, issues to be aired through residential picketing. While admitting the use of some content differentiation, the appellant asserts throughout his argument that the statute is a "place" regulation; it allows picketing at homes used for nonresidential purposes but not at those homes used exclusively for residential purposes. See, *e. g.*, the question presented for review in the Juris. Statement 4.

of business" *all* peaceful picketing is allowed. *Second*, if the residence is being used to "hol[d] a meeting or assembly on premises commonly used to discuss subjects of general public interest" *all* peaceful picketing is allowed. *Third*, if the residence is also used as a "place of employment" which is involved in a labor dispute, labor-related picketing is allowed. *Finally*, the statute provides that a resident is entitled to picket his own home. Thus it is clear that information about labor disputes may *not* be "freely disseminated" since labor picketing is restricted to a narrow category of residences. And Illinois has *not* "flatly prohibited all nonlabor picketing" since it allows nonlabor picketing at residences used as a place of business, residences used as public meeting places, and at an individual's own residence.

Only through this mischaracterization of the Illinois statute may the Court attempt to fit this case into the *Mosley* rule prohibiting regulation on the basis of *"content alone."* (Emphasis added.) *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972). For in *Mosley*, the sole determinant of an individual's right to picket near a school was the content of the speech. As the Court today aptly observes, such a regulation warrants exacting scrutiny. In contrast, the principal determinant of a person's right to picket a residence in Illinois is not content, as the Court suggests, but rather the character of the residence sought to be picketed. Content is relevant only in one of the categories established by the legislature.

The cases appropriate to the analysis therefore are those establishing the limits on a State's authority to impose time, place, and manner restrictions on speech activities. Under this rubric, even taking into account the limited content distinction made by the statute, Illinois has readily satisfied its constitutional obligation to draft statutes in conformity with First Amendment and equal protection principles. In fact, the very statute which the Court today cavalierly invalidates has been hailed by commentators as "an excellent model" of

legislation achieving a delicate balance among rights to privacy, free expression, and equal protection. See Kamin, Residential Picketing and the First Amendment, 61 Nw. U. L. Rev. 177, 207 (1966); Comment, 34 U. Chi. L. Rev. 106, 139 (1966). The state legislators of the Nation will undoubtedly greet today's decision with nothing less than exasperation and befuddlement. Time after time, the States have been assured that they may properly promote residential privacy even though free expression must be reduced. To be sure, our decisions have adopted a virtual laundry list of "Don'ts" that must be adhered to in the process. Heading up that list of course is the rule that legislatures must curtail free expression through the "least restrictive means" consistent with the accomplishment of their purpose, and they must avoid standards which are either vague or capable of discretionary application. But somewhere, the Court says in these cases (with a reassuring pat on the head to the legislatures), there *is* the constitutional pot of gold at the end of the rainbow of litigation.

Here, where Illinois has drafted such a statute, avoiding an outright ban on all residential picketing, avoiding reliance on any vague or discretionary standards, and permitting categories of permissible picketing activity at residences where the State has determined the resident's own actions have substantially reduced his interest in privacy, the Court in response confronts the State with the "Catch–22" that the less restrictive categories are constitutionally infirm under principles of equal protection. Under the Court's approach today, the State would fare better by adopting *more* restrictive means, a judicial incentive I had thought this Court would hesitate to afford. Either that, or uniform restrictions will be found invalid under the First Amendment and categorical exceptions found invalid under the Equal Protection Clause, with the result that speech and only speech will be entitled to protection. This can only mean that the hymns of praise in prior opinions celebrating carefully drawn statutes are no

more than sympathetic clucking, and in fact the State is damned if it does and damned if it doesn't.

Equally troublesome is the methodology by which these difficult questions of constitutional law have been reached. The Court today figuratively walked a country mile to find a potential unconstitutional application of this statute, and it is primarily on that potential which the total nullification of this statute rests. Just because it is a statute which is in issue does not relieve this Court of its duty to decide only the concrete controversy presented by the case. As discussed below, I think it quite clear that the statute does not prohibit the appellees in this action from engaging in conduct which must be protected under the First Amendment, the state interests would not be satisfied by a statute employing less restrictive means, the statute is not facially overbroad by prohibiting conduct which clearly must be permitted under the First Amendment, and the appellees have not themselves been denied equal protection because they do not seek to picket under circumstances which are indistinguishable from the circumstances where picketing is allowed. Only by speculating that there *might* be an individual or group that will be denied equal protection by the statute can the Court invalidate it. This is speculation this Court is not permitted to indulge in when nullifying the acts of a legislative branch.

I

The Illinois statute in issue simply does not contravene the First Amendment.

A

Repeatedly, this Court has upheld state authority to restrict the time, place, and manner of speech, if those regulations "protect a substantial governmental interest unrelated to the suppression of free expression" and are narrowly tailored, limiting the restrictions to those reasonably necessary to protect the substantial government interest. *Brown* v. *Glines*,

444 U. S. 348, 354 (1980); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980). This standard of measuring permissible state regulation, often echoed in this Court's opinions, is readily satisfied in this case.

The interest which the State here seeks to protect is residential privacy, as clearly demonstrated by the legislature's statement of purpose. *Ante*, at 464, n. 8. When a residence is used for exclusively residential purposes, the State recognizes no exception to the ban on picketing. As in this case, it has not been asserted that Mayor Bilandic's home fell into any category other than a residence used solely for residential purposes. The appellees nevertheless assert that their interest in publicizing their opinions on the issue of school integration outweigh the State's asserted interest in protecting residential privacy.

Our cases simply do not support such a construction of the First Amendment. In *Kovacs* v. *Cooper*, 336 U. S. 77, 81 (1949), the state interest in preventing interference with the "social activities in which [city residents] are engaged or the quiet that they would like to enjoy" warranted the prohibition of sound trucks on residential streets. In *Rowan* v. *United States Post Office Dept.*, 397 U. S. 728, 736 (1970), this Court held that "[t]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." The Court recognized a "very basic right to be free from sights, sounds, and tangible matter we do not want" in the home. *Ibid.* These interests were sufficient to justify a resident's ability to absolutely preclude delivery of unwanted mail to his address. Similarly, in *FCC* v. *Pacifica Foundation*, 438 U. S 726, 748 (1978), the Court found that an offensive broadcast could be absolutely banned from the airwaves because it "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." Under these authorities, the ap-

pellees have no fundamental First Amendment right to picket in front of a residence.

B

Nor can it be said that the state interest could be fully protected by a less restrictive statute. An absolute ban on picketing at residences used solely for residential purposes permissibly furthers the state interest in protecting residential privacy. The State could certainly conclude that the presence of even a solitary picket in front of a residence is an intolerable intrusion on residential privacy. The Court today suggests that some picketing activities would have but a "negligible impact on privacy interests," intimating that Illinois could satisfy its interests through more limited restrictions on picketing, such as regulating the hours and numbers of pickets. *Ante*, at 469. But I find nothing in the cases of this Court to suggest that a State may not permissibly conclude that even one individual camped in front of the home is unacceptable. It is the State, and not this Court, which legislates to prohibit evils which its citizens find unescapable, subject only to the limitations of the United States Constitution. Unlike sound trucks, it is not just the distraction of the noise which is in issue—it is the very presence of an unwelcome visitor at the home. As a Wisconsin court described in *Wauwatosa* v. *King*, 49 Wis. 2d 398, 411–412, 182 N. W. 2d 530, 537 (1971):

> "To those inside . . . the home becomes something less than a home when and while the picketing . . . continue[s]. . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility."

Whether noisy or silent, alone or accompanied by others, whether on the streets or on the sidewalk, I think that there are few of us that would feel comfortable knowing that a

stranger lurks outside our home. The State's prohibition of this conduct is even easier to justify than regulations previously upheld by this Court limiting mailings and broadcasts into the home. In *Rowan*, as in *Pacifica*, the resident at least could have short-circuited the annoyance by throwing away the mail or turning off the radio. Even that alternative redress, however, was held not sufficient to preclude the legislative authorities from prohibiting the initial intrusion. Where, as here, the resident has no recourse of escape whatsoever, the State may quite justifiably conclude that the protection afforded by a statute such as this seems even more necessary.

C

Thus the appellees cannot secure the invalidation of this statute by urging that they seek to engage in expression which must be protected by the First Amendment or by demonstrating that a statute less restrictive of picketing would satisfy the state interest. On occasion this Court has, of course, permitted invalidation of a statute even though the plaintiff's conduct was not protected if the statute clearly "sweeps within its prohibitions what may not be punished under the First . . . Amendmen[t]." *Grayned* v. *City of Rockford*, 408 U. S. 104, 114–115 (1972).

But this statute satisfies even the overbreadth challenge. It is arguable that when a resident has voluntarily used his home for nonresidential uses in a way which reduces the resident's privacy interest, and the person seeking to picket the home has no alternative forum for effectively airing the grievance because it relates to this nonresidential use of the home, some form of residential picketing might be protected under the First Amendment. The courts which have found general prohibitions on residential picketing to be permissible under the First Amendment have considered the question more difficult under such circumstances. For example, in *Walinsky* v. *Kennedy*, 94 Misc. 2d 121, 404 N. Y. S. 2d 491 (1977), the

New York court enjoined all residential picketing but concluded that

> "[a] more difficult question would be raised if the [resident's] office were in his home and there was thus no other suitable forum wherein he could be confronted or the picket's viewpoints could be heard." *Id.*, at 132, n. 15, 404 N. Y. S. 2d, at 498, n. 15.

Similarly, in *Hibbs* v. *Neighborhood Organization to Rejuvenate Tenant Housing*, 433 Pa. 578, 580, 252 A. 2d 622, 623–624 (1969), the court found that a slumlord could be picketed at his home, but only because he effectively operated his business out of his residence and no other alternative situs was available to air the dispute. This Court has intimated a similar concern in dicta in *Senn* v. *Tile Layers*, 301 U. S. 468 (1937). There the right of laborers under a state statute to picket the residence of an employer who operated his business in his home was upheld, and the Court went on to say that "[m]embers of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Id.*, at 478.

I would by no means say without more that the State would have to permit such residential picketing, but such circumstances would, as the courts have found, present the greatest potential for a complaint of overbreadth. The State in the present case has forestalled any such challenge, however, by exempting such groups from the ban on residential picketing. Whether *required* by the Constitution or not, such exemptions are the concern of this Court only if they *violate* the Constitution. This Court in fact upheld enforcement of a statute permitting similar residential picketing in *Senn* v. *Tile Layers*, *supra*. Since the State has a legitimate interest in protecting speech activity and in particular, providing a forum where no other is reasonably available, excluding residences used for nonresidential purposes from the general

prohibition on residential picketing is an entirely rational legislative policy, even if not mandated by the First Amendment. Thus no overbreadth challenge should succeed here.

II

Even though the statute does not prohibit conduct which is protected, the statute must also survive the hurdle of the Equal Protection Clause of the Fourteenth Amendment. By choosing a less-restrictive-means approach and excluding pickets at residences used for nonresidential purposes from the general prohibition, the Court concludes the State has violated equal protection. I do not think this result can be sustained because the appellees have not been denied equal protection and that is the only question this Court may properly review.

A

Police Department of Chicago v. *Mosley*, 408 U. S. 92 (1972), states a standard by which equal protection requirements in the First Amendment context must be measured. The Court in that case identified the "crucial question" as "whether there is an appropriate governmental interest suitably furthered by the differential treatment" of the appellees' picketing. *Id.*, at 95. The interest asserted by the city was the prevention of disruption in the schools. Thus the statute, to satisfy *Mosley*, should have prohibited all picketing which could reasonably be categorized as disruptive. Yet the ordinance permitted labor picketing while prohibiting picketing relating to race discrimination (and all other nonlabor topics), even though both forms of picketing were equally disruptive.

Thus the question is whether the State has a substantial interest in differentiating between the picketing which appellees seek to conduct and the picketing which is permitted under the statute. For equal protection does not require that "things which are different in fact . . . be treated in law

as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940). Appellees seek to picket a residence to voice their views on school integration. There has been no showing that the resident has used his home for nonresidential purposes, or that no other forum is available where appellees may publicize their dispute.[3] All pickets who fall within this category, no matter what the content of their expression may be, are prohibited from residential picketing. School integration, public housing, labor disputes, and the recognition of Red China are treated alike in this respect. The State has differentiated only when the residence has been used as a place of business, a place for public meetings, or a place of employment, or is occupied by the picket himself. In each of these categories, the State has determined that the resident has waived some measure of privacy through voluntary use of his home for these purposes.

Our cases clearly support a State's authority to design the permissibility of picketing in relation to the use to which a particular building is put. As stated in *Grayned* v. *City of Rockford*, 408 U. S., at 116: "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." The fact that all areas could be classified as school grounds, however, would not mean that all school grounds had to be subject to the same restrictions. As the Court in *Grayned* noted: "Different considerations, of course, apply in different circumstances. For example, re-

[3] If it is the Mayor the appellees seek to reach, they have not shown they cannot do so at city hall. If it is the neighborhoods they seek to reach, they have not shown that they cannot do so in neighborhood parks. I think it is now clear that when speech interests are countered by other substantial governmental interests, the availability of another forum is a highly relevant factor in determining the appropriate balance. See *Pell* v. *Procunier*, 417 U. S. 817, 823–824 (1974).

strictions appropriate to a single-building high school during class hours would be inappropriate in many open areas on a college campus. . . ." *Id.*, at 120, n. 45. And just as surely the State may differentiate between residences used exclusively for residential purposes and those which are not. It is far from nonsensical or arbitrary for a legislature to conclude that privacy interests are reduced when the residence is used for these other purposes. In another First Amendment case, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 61 (1973), we stated: "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs."

Despite the state interest in treating residences which are used for nonresidential purposes differently from residences which are not, the Court finds that the categories are improper because there is an element of content regulation in the statutory scheme. While content is clearly not the principal focus of the statutory categories, since content is only relevant in the one subcategory of "places of employment," the content restriction is quite clearly related to a legitimate state purpose. When an individual hires an employee to perform services in his home, it would not seem reasonable to conclude that the resident had so greatly compromised his residential status so as to permit picketing on any subject. The State may quite properly decide that the balance is better struck by the rule embodied in this statute which recognizes a more limited waiver of privacy interests by allowing only picketing relating to any labor dispute involving the resident *as employer* which has arisen out of the resident's choice of using his residence as a place of employment.

Content regulation, when closely related to a permissible state purpose, is clearly permitted. Surely the Court would not prohibit a city from preventing an individual from interrupting an orderly city council discussion of public housing to orate on the vices or virtues of nuclear power. Yet this is

content regulation. More accurately, it is restriction of topics to those appropriate to the forum. In this case, the forum is a confined one—residences used as a place of employment—and clearly labor picketing in that forum is the relevant topic.

This differentiation is supported by *Cox* v. *Louisiana*, 379 U. S. 559 (1965). There the Court upheld a state prohibition on picketing in front of a government building which was used as a courthouse if the content of the picketing could be presumed to demonstrate an intent to influence the judiciary. In *Cox* then, because of the nature of the state interest invoked, both the content of the picketing as well as the use of the building were considered determinative. The Court noted that if a mayor had an office in the courthouse and individuals were picketing on a topic relevant to the mayor, rather than the judiciary, then the speech would be permissible. Thus use and content, or as MR. JUSTICE STEVENS stated for the plurality in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), "content and context" are important determinants. As in *Cox*, a State need not treat residences which are used for different purposes in the same fashion, and when reasonably related to the state purpose, distinctions in content are permissible. See also *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978); *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975); *Young* v. *American Mini Theatres*, *supra*.

The question, therefore, is not whether there is some differentiation on the basis of content, but whether the appellees' prohibited conduct can be said to share the same characteristics of the conduct which is permitted. The Court devotes less than one page to what purports to be an equal protection analysis of this determinative question. In fact, only one sentence relates to the differences between the litigants in this case and the permitted picketing:

> "And, with particular regard to the facts of the instant case, it borders on the frivolous to suggest that a resi-

> dent who invites a repairman into his home to fix his television set has 'waived' his right to privacy with respect to a dispute between the repairman and the local union, but that the official who has voluntarily chosen to enter the public arena has not likewise 'waived' his right to privacy with respect to a challenge to his views on significant issues of social and economic policy." *Ante*, at 469.

First, it is unclear whether the Illinois statute would be construed to permit the type of labor picketing described in the Court's example where the dispute is not between the employer and the employee.[4] Second, the fact that an official has chosen to enter the public arena has no bearing on the question of how he uses his residence—the only question of relevance to the Illinois Legislature. Further, just as the State had an interest in *Cox* in preventing picketing which might tend to improperly influence the judicial process, the State certainly has an equal interest in preventing residential picketing of their officials where the result might be influence through the harassment of the official's family. This is not the type of influence that a democratic society has traditionally held high as a part of the Bill of Rights. Finally, at least in the case of the repairman, the home in fact is the situs of the publicized dispute, while the Mayor's home is not. The appellees do not seek to picket the situs of the dispute; they do not seek to picket the home of an individual who has used his residence for nonresidential purposes relevant to that dispute; they have not established the unavailability of any alternative forum. These are the characteristics of residen-

[4] If given an opportunity, the Illinois courts might determine that many repairmen are not "employees" under the statute. Further, it is also possible that the state courts would limit the disputes covered by the exception to those between the resident and his employee. More importantly, these are questions with which this court should not be concerned until the state courts have had an opportunity to address them. See *infra*, at 488.

tial picketing which the State has allowed. The appellees have thereby failed to establish that they seek to picket under circumstances rationally indistinguishable from the circumstances under which the State has permitted picketing. They have therefore not been denied equal protection.

B

The Court makes little effort to establish that the appellees seek to picket under circumstances which are indistinguishable from the picketing permitted under the statute. Instead, it places the fulcrum of its equal protection argument on the fact that there might well be other actions of a homeowner which would constitute a "nonresidential" use of his property, warranting additional statutory exceptions. While I am not persuaded that the Court has identified an example of another picket who should likewise be permitted to picket under the justification forwarded by the State,[5] the flaws in

[5] The Court identifies several examples of picketing which the State would allegedly have to allow in order to avoid a successful equal protection attack. The Court indicates that there is no ground for differentiating between the picketing which is permitted and picketing relating to landlord-tenant disputes, zoning disputes, and historic preservation issues. *Ante*, at 468–469, n. 13. The first of these examples seems particularly inappropriate since picketing in relation to landlord-tenant disputes would most likely be permissible under the statute just as written. The statute exempts picketing by an individual at his residence, so it would certainly appear that a tenant could picket in front of his own dwelling (which also happens to be the situs of the dispute). If the landlord operates his business out of his home, the tenants would also be able to picket there under the statute. Thus there is no reason to believe that the picketing opportunities of tenants have been substantially limited by the statutory classifications, and in fact would appear to be at least as broad as those afforded to employees with labor disputes. Zoning disputes and historic preservation issues are distinguishable in several respects. First, those issues have no relationship to the use of an individual's residence (other than their own, which of course they may picket) and the individual resident would not have waived any privacy interests.

the analysis are more fundamental. First, the fact that there may be someone other than the appellees who has a right to be treated similarly to those permitted to picket is irrelevant to the question of constitutional validity in this case. The Court apparently believes it has a license to import the more relaxed standing requirements of First Amendment overbreadth into equal protection challenges. This, however, is not and should not be the law. Precedent supports no such approach and the rationale underlying the expanded standing principles in the overbreadth context are inapposite in the equal protection realm.

As we stated in *Grayned*, standing to challenge an ordinance which has been constitutionally applied to the plaintiff is permitted because otherwise the statute, if allowed to stand until a later challenge, will "deter privileged activity." 408 U. S., at 114. In the equal protection context, however, we are not concerned that conduct which *must* be permitted under the First Amendment will be prohibited, but only that conduct which could be and is properly prohibited be permitted if indistinguishable from other permitted conduct. The impact on speech is therefore a minimal one, while the jurisprudential considerations for declining to consider alternative applications loom large.

In *Barrows* v. *Jackson*, 346 U. S. 249, 256 (1953), an equal protection case, the Court identified the ordinary rule that, "even though a party will suffer a direct substantial injury

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Second, alternative forums would theoretically include residential parks as well as the office of the authorities responsible for the relevant decisions.

The Court's citation of lawn decorations as a waiver of residential privacy seems odd since that act does not involve the voluntary admission of strangers into the home for some nonresidential purposes—a characteristic shared by each of the other exceptions. *Ante*, at 469. The Court's citation of a political party meeting is also distinguishable since this example does not share the commercial attributes of the other exemptions—where "nonresidential use" seems most readily found. An alternative forum would also not seem difficult to obtain in those circumstances.

from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed." The Court justified the rule, stating:

> "One reason for this ruling is that the state court, when actually faced with the question, might narrowly construe the statute to obliterate the objectionable feature, or it might declare the unconstitutional provision separable. *New York ex rel. Hatch* v. *Reardon*, [204 U. S.], at 160–161. . . . It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. Nor are we so ready to frustrate the expressed will of Congress or that of the state legislatures. Cf. *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 172." *Id.*, at 256–257.

More recently in *Craig* v. *Boren*, 429 U. S. 190, 193 (1976), we emphasized that standing is "designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." Sound principles of standing simply do not permit this Court to entertain any claim by the appellees in this action that someone other than themselves *might* be denied equal protection by the operation of the statute. See also *Young* v. *American Mini Theatres, Inc.*, 427 U. S., at 58–59, 60; *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973). This consideration is particularly compelling in this case since the appellees had an opportunity to seek a limiting construction of the statute by the Illinois courts when originally prosecuted for their picketing, but chose to plead guilty instead, thereby denying the one court system that could authoritatively limit the statute the opportunity to do so.

Even if this Court could properly take cognizance of the fact that some identifiable person not clearly encompassed in the statutory categories permitting picketing should also be

allowed to picket, under equal protection standards, that fact alone would not justify wholesale invalidation of the entire statutory framework. In *Califano* v. *Jobst*, 434 U. S. 47, 53–55 (1977), this Court emphasized that sound equal protection analysis must uphold general rules "even though such rules inevitably produce seemingly arbitrary consequences in some individual cases," and that "the broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." Any other standard of review, such as that employed by the Court today, will inevitably lead to invalidation, for this or any other court will always be able to conceive of a hypothetical not properly accounted for by the statutory categories. The state courts, if given an opportunity, have the tools to correct such minor deficiencies. This Court has soundly permitted state legislatures far more room for error in the drafting of its categories than what the Court today allows. As it stated in *Ginsberg* v. *New York*, 390 U. S. 629, 642–643 (1968), "[w]e do not demand of legislatures 'scientifically certain criteria of legislation,' *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110." And more recently, we recognized a compelling need to allow to local government "a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young* v. *American Mini Theatres*, *supra*, at 71.

I can conclude this dissent with no more apt words than those of Mr. Justice Frankfurter in his concurring opinion in *Kovacs* v. *Cooper*, 336 U. S., at 97: "[I]t is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection."

NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1082. Argued April 22, 1980—Decided June 20, 1980

This case presents the question whether Rules on Containers (Rules) in a collective-bargaining agreement between the International Longshoremen's Association (ILA) and employer organizations in the shipping industry which were adopted in response to the technological innovation of containerized shipping are a lawful work preservation agreement. The new technology involves the use on specially designed ships of large, reusable metal receptacles which can be moved on and off the vessel unopened and which can be attached to a truck chassis and transported intact to and from the pier, saving costs and time in loading and unloading ships and in warehousing cargo, as compared with the amount of on-pier work involved in handling loose cargo for conventional ships. The amount of work available for longshoremen has been further reduced by the shipping companies' practice of making their containers available for loading (stuffing) and unloading (stripping) away from the pier by shippers and by freight consolidators who combine the goods of various shippers into a single shipment. The Rules permit the great majority of containers to pass over the piers intact, reserving to the ILA the right to stuff and strip at the pier only those containers that would otherwise be stuffed or stripped "locally" (within a 50-mile radius of the port) by anyone except employees of the beneficial owner of the cargo, the shipping company being liable for specified liquidated damages for any container handled in violation of the Rules. Separate unfair labor practice proceedings were brought before the National Labor Relations Board (Board) by truckers and consolidators who, because of the operation against shipping companies of the Rules' liquidated-damages provisions, could no longer perform local stuffing and stripping services. The Board concluded that the Rules were not valid work preservation clauses because the work of stuffing and stripping containers away from the pier had not traditionally been done by ILA members, but had instead been performed by employees of consolidators and truckers. It therefore held that the Rules violated § 8 (e) of the National Labor Relations Act, which makes unlawful those collective-bargaining agreements whereby the employer agrees to cease doing business with any other person, and that union action to enforce

the Rules violated § 8 (b) (4) (B), which prohibits unions from engaging in secondary activities whose object is to force one employer to cease doing business with another. The Court of Appeals, consolidating the cases and holding that the Board had erred as a matter of law in defining the work in controversy, vacated the Board's decisions, denied its applications for enforcement, and remanded the cases.

Held: The Board's definition of the work in controversy in this dispute was erroneous as a matter of law. Pp. 503–513.

(a) To constitute a lawful work preservation agreement, the agreement must have as its objective the preservation of work traditionally performed by employees represented by the union, and the contracting employer must have the power to give the employees the work in question. The first and most basic question is: What is the "work" that the agreement allegedly seeks to preserve? Cf. *NLRB* v. *Pipefitters*, 429 U. S. 507; *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612. Pp. 504–505.

(b) Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance. The inquiry must focus on the bargaining unit employees' work, not on the work of other employees who may be doing the same or similar work, and must examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it. P. 507.

(c) The Board's conclusion that the "work in controversy" was the off-pier stuffing and stripping of containers erroneously focused on the work done by the employees of truckers and consolidators after the introduction of containerized shipping. That approach foreclosed, by definition, any possibility that the longshoremen could negotiate an agreement to permit them to play any part in the loading and unloading of containerized cargo. The Board's determination that the traditional work of ILA members was to load and unload ships should have been only the beginning of the analysis. The next step is to look at how the contracting parties sought to preserve that work, to the extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members. Pp. 507–510.

(d) Viewing the work allegedly to be preserved by the Rules from the proper perspective, the Board on remand will be free to determine

whether the Rules represent a lawful attempt to preserve traditional longshore work, or whether, instead, they are tactically calculated to satisfy union goals elsewhere. This determination must be informed by an awareness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace, the question being not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs. If the Board finds that the Rules have a lawful work preservation objective, it must then consider the charging parties' contention that members of the employer organization did not have the right to control the stuffing and stripping of containers. Pp. 510–512.

198 U. S. App. D. C. 157, 613 F. 2d 890, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which STEWART, REHNQUIST, and STEVENS, JJ., joined, *post*, p. 522.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Stephen M. Shapiro, Robert E. Allen, Norton J. Come, Linda Sher,* and *Howard E. Perlstein. J. Alan Lips* argued the cause for Tidewater Motor Truck Association, respondent under this Court's Rule 21 (4), in support of petitioner. With him on the briefs was *Marshall T. Bohannon, Jr.*

Thomas W. Gleason argued the cause for respondent International Longshoremen's Association, AFL–CIO. With him on the brief were *Ernest L. Mathews, Jr.,* and *Andre Mazzola Mardon. Constantine P. Lambos* argued the cause for respondents New York Shipping Association, Inc., et al. With him on the brief were *Francis A. Scanlan, Alfred A. Giardino,* and *Donato Caruso. Carl W. Schwarz* and *Stephen P. Murphy* filed a brief for respondent Dolphin Forwarding, Inc. *Whiteford S. Blakeney* and *William L. Auten* filed a brief for respondent Houff Transfer, Inc.*

*Briefs of *amici curiae* urging reversal were filed by *Kenneth C. McGuiness, Robert E. Williams,* and *Daniel R. Levinson* for the Air Condi-

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether provisions of the collective-bargaining agreement between the International Longshoremen's Association (ILA) and employer organizations in the shipping industry which were adopted in response to the technological innovation of containerized shipping are a lawful work preservation agreement. The National Labor Relations Board held that the provisions did not preserve traditional work opportunities for employees represented by the union, but sought instead to acquire work they had not previously performed; therefore, it concluded that the provisions violated § 8 (e) of the National Labor Relations Act, 29 U. S. C. § 158 (e), and union action to enforce them violated § 8 (b)(4)(B) of the Act, 29 U. S. C. § 158 (b)(4)(B). *International Longshoremen's Assn.* (*Dolphin Forwarding, Inc.*), 236 N. L. R. B. 525 (1978); *International Longshoremen's Assn.* (*Associated Transport, Inc.*), 231 N. L. R. B. 351 (1977). A divided panel of the United States Court of Appeals for the District of Columbia Circuit declined to enforce the Board's orders. 198 U. S. App. D. C. 157, 613 F. 2d 890 (1979). We granted certiorari, 444 U. S. 1042 (1980), to resolve a conflict among the Circuits on this important question of federal labor law.[1]

I

This controversy arises out of the collective-bargaining response of the ILA and the east coast shipping industry to

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tioning & Refrigeration Institute et al.; by *Nelson J. Conney, Kenneth E. Siegel, Robert A. Hirsch,* and *Alan J. Thiemann* for the American Trucking Associations, Inc.; and by *Raymond P. de Member* for the International Association of NVOCCS.

[1] A contrary result was reached in *International Longshoremen's Assn., Local 1575* v. *NLRB,* 560 F. 2d 439 (CA1 1977), and in *International Longshoremen's Assn.* v. *NLRB,* 537 F. 2d 706 (CA2 1976), cert. denied, 429 U. S. 1041 (1977). Cf. *Humphrey* v. *International Longshoremen's Assn.,* 548 F. 2d 494 (CA4 1977).

containerization, a technological innovation which has had such a profound effect on that industry that it has frequently been termed "the container revolution." [2] In the words of one observer, "containerization may be said to constitute the single most important innovation in ocean transport since the steamship displaced the schooner." [3]

A

Containers are large, reusable metal receptacles, ranging in length from 20 to 40 feet and capable of carrying upwards of 30,000 pounds of freight, which can be moved on and off an ocean vessel unopened. Container ships are specially designed and constructed to carry the containers, which are affixed to the hold. A container can also be attached to a truck chassis and transported intact to and from the pier like a conventional trailer.

The use of containers is substantially more economical than traditional methods of handling ocean-borne cargo.[4] Because cargo does not have to be handled and repacked as it moves from the warehouse by truck to the dock, into the vessel, then from the vessel to the dock and by truck or rail to its destination, the costs of handling are significantly reduced. Expenses of separate export packaging, storage, losses from pilferage and breakage, and costs of insurance and processing cargo documents may also be decreased. Perhaps most sig-

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[2] See, *e. g.*, Ullman, The Role of the American Ocean Freight Forwarder in Intermodal, Containerized Transportation, 2 J. Mar. L. & Comm. 625, 627 (1971); Schmeltzer & Peavy, Prospects and Problems of the Container Revolution, 1 J. Mar. L. & Comm. 203 (1970); Note, Containerization and Intermodal Service in Ocean Shipping, 21 Stan. L. Rev. 1077, 1078 (1969).

[3] Ross, Waterfront Labor Response to Technological Change: A Tale of Two Unions, 21 Lab. L. J. 397, 398 (1970).

[4] See Ross, *supra* n. 3, at 399–400; Schmeltzer & Peavy, *supra* n. 2, at 206–210; Note, *supra* n. 2, at 1087–1092.

nificantly, a container ship can be loaded or unloaded in a fraction of the time required for a conventional ship.[5] As a result, the unprofitable in-port time of each ship is reduced, and a smaller number of ships are needed to carry a given volume of cargo.[6]

Before the introduction of container ships, and as is still the case with conventional vessels, trucks delivered loose, or break-bulk, cargo to the head of the pier. The cargo was then transferred piece by piece from the truck's tailgate to the ship by longshoremen employed by steamship or stevedoring companies. The longshoremen checked the cargo, sorted it, placed it on pallets and moved it by forklift to the side of the ship, and lifted it by means of a sling or hook into the ship's hold.[7] The process was reversed for cargo taken off incoming ships. With the advent of containers, the amount of on-pier work involved in cargo handling has been drastically reduced, since the cargo need not be loaded and unloaded piece by piece. The amount of work available for longshoremen has been further reduced by the shipping companies' practice of making their containers available to ship-

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[5] See Ross, *supra* n. 3, at 399 (36-48 hours, compared to 7 or 8 days for conventional vessel); Schmeltzer & Peavy, *supra* n. 2, at 208 (8 hours compared to 3 days).

[6] See Note, *supra* n. 2, at 1088 (container ship spends 25% of its time in port, compared to 60% for conventional vessel).

[7] The longshore unit in the Port of New York was certified by the National Labor Relations Board as

"[a]ll longshore employees engaged in work pertaining to the rigging of ships, coaling of same, loading and unloading of cargoes, including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships, including hatch bosses; cargo repairmen, checkers, clerks and timekeepers and their assistants, including head receiving and delivery clerks; general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers, and marine carpenters, in the Port of Greater New York and vicinity. . . ." *New York Shipping Assn.*, 116 N. L. R. B. 1183, 1188 (1956) (footnote omitted).

pers and consolidators [8] for loading and unloading away from the pier.

Containerization, then, was a technological advance of great importance to the shipping industry which at the same time threatened the jobs of longshoremen by dramatically increasing their productivity.[9] As one might expect, the subject has been a hotly disputed topic of collective bargaining between the union and the employers.[10] We are concerned with the results of that collective-bargaining process as it affects the shipping industry in the Ports of New York, Baltimore, and Hampton Roads, Va.

B

It is necessary, in discussing the collective-bargaining agreements here at issue, to define certain industry terms of art

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[8] A freight consolidator combines the goods of various shippers into a single shipment at its own off-pier terminal and delivers the shipment to the pier. Ordinarily, consolidators operate no transportation of their own except for pickup and delivery equipment. They contract with carriers, such as truckers and steamship lines, for the actual transportation of the goods. See Comment, Intermodal Transportation and the Freight Forwarder, 76 Yale L. J. 1360, 1362 (1967). A consolidator who acts as a carrier by arranging for the transportation of goods from port to port is called a nonvessel operating common carrier by water (NVOCC), and is regulated by the Federal Maritime Commission. See Federal Maritime Commission, Preliminary Staff Report on Non-Vessel Operating Common Carriers by Water (Dec. 8, 1970); see generally Ullman, *supra* n. 2.

[9] See, *e. g.*, 198 U. S. App. D. C., at 159, 613 F. 2d, at 892; Ross, *supra* n. 3, at 400.

[10] The longshoremen involved in this dispute are represented by the ILA. Their employers, shipowners and stevedoring companies operating in the Ports of New York, Baltimore, and Hampton Roads, belong to several employers' organizations. These include the New York Shipping Association (NYSA), the Steamship Trade Association of Baltimore (STAB), and the Hampton Roads Shipping Association (HRSA). Since 1970, the Council of North Atlantic Shipping Associations (CONASA), a multiemployer bargaining association representing shipping associations including NYSA, STAB, and HRSA, has bargained with ILA on a master-contract basis.

pertaining to containerized cargo. Loading cargo into a container is called "stuffing"; unloading cargo from a container is called "stripping." Containers holding goods beneficially owned by one shipper or consignee are called full shippers' loads (FSL). Containers holding goods belonging to more than one shipper or consignee are called consolidated container loads. Such cargo is also called "less than trailer load" (LTL) or "less than container load" (LCL) cargo.

The first collective-bargaining agreement to contain a provision dealing with containerized shipping was the 1959 agreement between ILA and the New York Shipping Association (NYSA). At that time, containerization was in its infancy.[11] The provision in the 1959 agreement was prompted by a dispute over the use of Dravo containers, boxes eight cubic feet in size. See *International Longshoremen's Assn. (Consolidated Express, Inc.)*, 221 N. L. R. B. 956, 957 (1975), enf'd, 537 F. 2d 706 (CA2 1976), cert. denied, 429 U. S. 1041 (1977). The agreement recognized the right of NYSA members "to use any and all type [*sic*] of containers without restriction or stripping by the union." 221 N. L. R. B., at 957. In return, NYSA agreed to contribute royalty payments on "containers which are loaded or unloaded away from the pier by non-ILA labor." *Ibid.* The agreement also provided:

> "Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them,

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[11] The first specially fitted container ship began operating in the late 1950's between New York and Puerto Rico. See App. 117. As late as 1966, the percentage of general cargo moved by containers in the Port of New York was only 3%. See Ross, *supra* n. 3, at 398. The first container ships did not appear in the Ports of Baltimore and Hampton Roads until 1965 and 1966. See 198 U. S. App. D. C., at 161, 613 F. 2d, at 894; *International Longshoremen's Assn. (Associated Transport, Inc.)*, 231 N. L. R. B. 351, 359 (1977).

or whether through direct contracting out, shall be performed by ILA labor at longshore rates." *Ibid.*

After the 1959 agreement was reached, the development of container shipping accelerated. In 1967, ILA demanded in collective-bargaining negotiations that longshoremen stuff and strip all containers crossing the piers. Following a lengthy strike, ILA and NYSA in 1969 adopted, as part of their 1968–1971 collective-bargaining agreement, the Rules on Containers (Rules). The terms of that master agreement were adopted by other ports on the North Atlantic coast, including Hampton Roads and Baltimore. The Rules were slightly modified in 1971, after another long strike. In 1973 ILA and the Council of North Atlantic Shipping Associations (CONASA) executed the "Dublin Supplement" as an "interpretive bulletin" to the Rules. The substance of the Dublin Supplement was incorporated in the version of the Rules contained in the 1974–1977 collective-bargaining agreement.[12]

In essence, the Rules contained in the 1968 and 1971 agreements provided that if containers owned or leased by the shipping companies and carrying LTL or consolidated container loads were to be stuffed or stripped within the local port area (that is, within a geographical radius of 50 miles of the port) by anyone other than the employees of the beneficial owner of the cargo, that work must be done at the piers by ILA labor. The shipping companies were required to pay a royalty on containers that passed over the piers intact, as well as liquidated damages, presently set at $1,000 per container, for any container handled in violation of the Rules. The Dublin Supplement declared that the Rules applied to all containers, including those designated as FSL containers, which were stuffed or stripped in the local area by other than the beneficial owner's own employees. The Supplement also noted an exception for FSL containers warehoused locally for at least 30 days, and, as a method of enforcing the Rules,

[12] The 1974 Rules are reproduced in the appendix to this opinion.

prohibited the employers from releasing any of their containers to known consolidators with facilities located within 50 miles of the port.

Thus, under the final version of the Rules incorporated in the 1974 agreement, if containers owned or leased [13] by the shipping companies are to be stuffed or stripped locally by anyone other than the employees of the beneficial owner of the cargo, that work must be done at the piers by ILA labor. FSL containers that are transported intact to or from the beneficial owner or that are warehoused locally for 30 days, and consolidated containers coming from or bound for points outside the local area, do not have to be stuffed and stripped by ILA members. The practical effect of the Rules is that some 80% of containers pass over the piers intact. App. 612. The remaining 20% are stuffed and stripped by longshoremen, regardless of whether that work duplicates work done by non-ILA employees off-pier.

C

This case involves two proceedings before the National Labor Relations Board (Board) on charges that the Rules are illegal secondary activity in violation of federal labor law. The cases were consolidated on appeal. The *Dolphin* proceeding, 236 N. L. R. B. 525 (1978), concerns the application

[13] The 1968 and 1971 versions of the Rules referred only to containers "owned or leased" by the employers, see App. 237, 238, 247, 272, 273. The 1974 agreement refers to containers "owned, leased or used by carriers." See *infra*, at 514. There is nothing in the record to indicate that the fines which led to the unfair labor practice charges before us were imposed for infractions relating to containers which were not owned or leased by CONASA members. Therefore we, like the Board and the Court of Appeals, assume that the Rules have application only to containers that belong to the contracting employers. See 198 U. S. App. D. C., at 179, 613 F. 2d, at 912; 236 N. L. R. B., at 526; 231 N. L. R. B., at 359; *International Longshoremen's Assn. (Consolidated Express, Inc.)*, 221 N. L. R. B. 956, 958, 959 (1975); but see 231 N. L. R. B., at 353, n. 3 (Fanning, Chairman, dissenting).

of the provisions on LCL cargo to containers used by consolidators operating within 50 miles of the Port of New York. The *Associated Transport* proceeding, 231 N. L. R. B. 351 (1977), concerns the application of the Rules to FSL containers whose cargo was transferred by truckers to their own trucks within 50 miles of the Ports of Baltimore and Hampton Roads. The affected truckers and consolidators filed unfair labor practice charges with the Board, alleging that the Rules constituted a "hot cargo" agreement in violation of § 8 (e) of the National Labor Relations Act (Act) and that the activities of the parties to the agreement in enforcing its terms were an illegal secondary boycott prohibited by § 8 (b)(4)(B) of the Act.

The facts underlying the charges may be briefly stated. Dolphin Forwarding, Inc. (Dolphin), and San Juan Freight Forwarding, Inc. (San Juan), were NVOCC consolidators, see n. 8, *supra*, soliciting business from shippers throughout the United States who wished to transport LCL cargo between New York and Puerto Rico.[14] Dolphin and San Juan received their customers' goods at their off-pier facilities, located within 50 miles of the Port of New York. Using subcontracted non-ILA labor, they consolidated the goods of two or more shippers, stuffed them into containers provided by members of NYSA, and had the filled containers trucked to the pier to be loaded onto ships by longshoremen.[15] As a result of these practices, the NYSA members who had supplied their containers to the consolidators were assessed liquidated damages of approximately $47,000. Those carriers then

[14] Dolphin has since ceased doing business in New York.

[15] Dolphin began such operations several years before the adoption of the Rules. The NYSA members contended that they supplied containers to Dolphin only because it listed Massachusetts as the point of origin for the containers rather than the actual facility within the port area. San Juan was established in 1972, several years after the Rules were first adopted. It apparently listed Chicago as the point of origin of containers it shipped. 198 U. S. App. D. C., at 166, 613 F. 2d, at 899.

informed Dolphin and San Juan that they would no longer furnish them with containers. Thereupon, Dolphin and San Juan filed unfair labor practice charges with the Board.

Houff Transport, Inc. (Houff), and Associated Transport, Inc. (Associated),[16] were Interstate Commerce Commission-licensed common carriers who operated motor freight terminals within 50 miles of the Ports of Baltimore and Hampton Roads. Since the advent of containerization, they had transported FSL container loads to consignees both within and beyond the 50-mile radius, and routinely stripped such FSL containers and restuffed the cargo into their own vehicles for reasons of economy, safety, or state highway or bridge regulations.

The practice of using non-ILA labor to strip and restuff FSL cargo within the 50-mile radius is known as shortstopping. Although the Rules, prior to the Dublin Supplement, did not expressly discuss FSL cargo, see App. 235–250, 270–276, the ILA and the shipping companies apparently regarded shortstopping as an infraction, see 198 U. S. App. D. C., at 162, 613 F. 2d, at 895; 231 N. L. R. B., at 355 (Fanning, Chairman, dissenting). The Dublin Supplement, and subsequent versions of the Rules, provided that ILA labor must handle all FSL containers that otherwise would be handled within the local area by other than the consignee's own employees, except for FSL cargo consigned to the beneficial owner's place of business or warehoused for 30 days within the port area.

After the new Rules became effective, Houff and Associated shortstopped containers picked up from CONASA members. The shipping companies were assessed liquidated damages for each such container. When Houff and Associated refused to indemnify them for the fines, the shipping companies canceled their interchange agreements. Houff, Associated, and the Tidewater Motor Truck Association (TMTA), an asso-

[16] Associated is no longer in business.

ciation of which Associated was a member, filed unfair labor practice charges.

In holding that the charges were substantiated in both the *Dolphin* and *Associated Transport* proceedings, the Board relied on its previous decision in *International Longshoremen's Assn. (Consolidated Express, Inc.)*, 221 N. L. R. B. 956 (1975), enf'd, 537 F. 2d 706 (CA2 1976), cert. denied, 429 U. S. 1041 (1977) (hereinafter *Conex*).[17] In *Conex*, the Board held that the traditional work of longshoremen has been to load and unload ships at the pier. As the Board explained in the *Dolphin* proceeding, *Conex*

> "held that the Rules were not valid work-preservation clauses in that traditionally the off-pier stuffing and stripping of containers was performed by consolidating companies and not longshoremen. Since the work was not traditional longshore work and had never been performed by longshoremen, the Rules which required the shipping companies to stop doing business with consolidators did not have a lawful work-preservation object." 236 N. L. R. B., at 526.

Similarly, in the *Associated Transport* proceeding the Board affirmed the finding by the Administrative Law Judge (ALJ) of an unfair labor practice because longshoremen "had *not* historically done the work" of stripping FSL containers away from the pier. 231 N. L. R. B., at 353 (emphasis in original).

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[17] The Rules were first litigated in 1970 when the United States Court of Appeals for the Second Circuit rejected a claim that their enforcement violated the antitrust laws. The Court of Appeals held that the Rules came under the labor exemption. *Intercontinental Container Transport Corp.* v. *New York Shipping Assn.*, 426 F. 2d 884 (1970). The plaintiff in the antitrust proceeding also initiated related unfair labor practice proceedings before the Board by filing unfair labor practice charges alleging violations of §§ 8 (e) and 8 (b) (4) (B). The Regional Director's dismissal of the charges, on the ground that the Rules were a valid work preservation agreement, was affirmed on appeal by the Board's General Counsel. App. 621.

In short, in the Board's view the Rules sought to acquire for ILA members work that had historically been performed not by longshoremen but by employees of consolidators and truckers. Therefore the Rules had a secondary objective forbidden by the Act.

ILA and CONASA appealed to the Court of Appeals, and the Board cross-applied for enforcement of its orders.[18] The cases were consolidated. A divided panel of the Court of Appeals refused enforcement, holding that the Board had erred as a matter of law in defining the work in controversy. It therefore vacated the Board's decisions, denied its applications for enforcement, and remanded the cases for further proceedings. We affirm.

II

Section 8 (b)(4)(B) of the Act[19] prohibits unions and their agents from engaging in secondary activities whose object is to force one employer to cease doing business with another. Section 8 (e)[20] makes unlawful those collective-

[18] Houff intervened on appeal, and TMTA and Dolphin were permitted to intervene after the Court of Appeals issued its decision.

[19] Section 8 (b), as set forth in 29 U. S. C. § 158 (b), provides in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

. . . . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike or primary picketing. . . ."

[20] Section 8 (e), as set forth in 29 U. S. C. § 158 (e), provides in pertinent part:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied,

bargaining agreements in which the employer agrees to cease doing business with any other person. Although § 8 (e) does not in terms distinguish between primary and secondary activity, we have held that, as in § 8 (b)(4)(B), Congress intended to reach only agreements with secondary objectives. See *NLRB* v. *Pipefitters*, 429 U. S. 507, 517 (1977) (hereinafter *Pipefitters*); *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 620, 635 (1967) (hereinafter *National Woodwork*).

Among the primary purposes protected by the Act is "the purpose of preserving for the contracting employees themselves work traditionally done by them." *Pipefitters, supra,* at 517. Whether an agreement is a lawful work preservation agreement depends on "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the [agreement was] tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." *National Woodwork, supra,* at 644–645 (footnotes omitted). Under this approach, a lawful work preservation agreement must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called "right of control" test of *Pipefitters, supra.* The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objec-

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whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . ."

tive, that is, to influence whoever does have such power over the work. "Were the latter the case, [the contracting employer] would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary." *National Woodwork, supra,* at 644–645.

In applying the work preservation doctrine, the first and most basic question is: What is the "work" that the agreement allegedly seeks to preserve? Sometimes the process of identifying the work at issue will require no subtle analysis. In *National Woodwork,* for example, the agreement preserved for the carpenters employed by a general contractor the work of fitting all doors installed on the jobsite. This was work they had always done, and the method the parties chose to preserve the carpenters' right to that work was simply to prohibit the employer from purchasing any doors that had been prefitted by any other employees. That the provision incidentally required the employer to boycott all prefitted doors was of no consequence to the validity of the agreement. See *Pipefitters, supra,* at 510, 526.

But in many cases it is not so easy to find the starting point of the analysis. Work preservation agreements typically come into being when employees' traditional work is displaced, or threatened with displacement, by technological innovation. The national labor policy expresses a preference for addressing "the threats to workers posed by increased technology and automation" by means of "labor-management agreements to ease these effects through collective bargaining on this most vital problem created by advanced technology." *National Woodwork, supra,* at 641, 642. In many instances, technological innovation may change the method of doing the work, instead of merely shifting the same work to a different location. One way to preserve the work of the employees represented by the union in the face of such a change is simply to insist that the innovation not be adopted and that the work continue to be done in the traditional way.

The union in *National Woodwork* followed this tactic and negotiated an agreement in which the employer agreed not to use prefabricated materials. We held that agreement was lawful under §§ 8 (e) and 8 (b)(4)(B). But the protection Congress afforded to work preservation agreements cannot be limited solely to employees who respond to change with intransigence. Congress, in enacting § 8 (e), did not intend to protect only certain kinds of work preservation agreements; rather, it "had no thought of prohibiting agreements directed to work preservation," *National Woodwork, supra,* at 640. The work preservation doctrine, then, must also apply to situations where unions attempt to accommodate change while preserving as much of their traditional work patterns as possible.[21] When this is the case the inquiry must be more refined and the analysis more discriminating.

The Board held that " '[t]he traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.' " 231 N. L. R. B., at 364 (decision of ALJ, adopted by the Board), quoting *Conex,* 221 N. L. R. B., at 959; see 236 N. L. R. B., at 526. The Board then determined that the work in controversy was "the off-pier stuffing and stripping of containers," *ibid.;* see 231 N. L. R. B., at 364–365. Similarly, in *Conex* the Board stated: "It is clear from the record that the work in controversy here is the LCL and LTL container work performed by [the charging parties] at their own off-pier premises." 221 N. L. R. B., at 959. Because ILA members had never performed such work, the Board concluded that the Rules were an illegal attempt to reach out and acquire work that was not within the union's traditional work jurisdiction and which its members had never performed. We agree with the Court of Appeals that this

[21] See Comment, Work Recapture Agreements and Secondary Boycotts: *ILA* v. *NLRB* (*Consolidated Express, Inc.*), 90 Harv. L. Rev. 815 (1977).

approach to defining the work at issue was incorrect as a matter of law.

The Board's approach reflects a fundamental misconception of the work preservation doctrine as it has been applied in our previous cases. Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance. The analysis must take into account "all the surrounding circumstances," *National Woodwork*, 386 U. S., at 644, including the nature of the work both before and after the innovation. In a relatively simple case, such as *National Woodwork* or *Pipefitters*, the inquiry may be of rather limited scope. Other, more complex cases will require a broader view, taking into account the transformation of several interrelated industries or types of work; this is such a case. Whatever its scope, however, the inquiry must be carefully focused: to determine whether an agreement seeks no more than to preserve the work of bargaining unit members, the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work,[22] and examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it.

The Board, by contrast, focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping. It found that work was similar to work those employees had done before the innovation, and concluded that ILA was

[22] The effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer. See *Pipefitters*, 429 U. S., at 510, 526.

trying to acquire the traditional work of those employees. That conclusion ignores the fact that the impact of containerization occurred at the interface between ocean and motor transport; not surprisingly, the work of stuffing and stripping containers is similar to work previously done by both longshoremen and truckers. The Board's approach would have been entirely appropriate in considering an agreement to preserve the work of truckers' employees, but it misses the point when applied to judge this contract between the ILA and the shipowner employers.

By focusing on the work as performed, after the innovation took place, by the employees who allegedly have displaced the longshoremen's work, the Board foreclosed—by definition—any possibility that the longshoremen could negotiate an agreement to permit them to continue to play any part in the loading or unloading of containerized cargo. For the very reason the Rules were negotiated was that longshoremen do not perform that work away from the pier, and never have. Thus it is apparent that under the Board's approach, in the words of the Court of Appeals, the "work preservation doctrine is sapped of all life." 198 U. S. App. D. C., at 176, 613 F. 2d, at 909.

That this is so is vividly demonstrated by considering how different would have been the results in *National Woodwork* and *Pipefitters* if we had adopted the approach now chosen by the Board. In *National Woodwork* we held that carpenters could seek to preserve their traditional work of finishing blank doors at the construction jobsite by prohibiting the employer, a general contractor, from purchasing prefinished doors from the factory. If we had followed the Board's current approach in analyzing the agreement, we would have defined the work in controversy as "the finishing of blank doors away from the construction site." That work, of course, had never been done by the carpenters employed by the general contractor, but had been performed by the employees of

the door manufacturers since before the adoption of the agreement. We would perforce have determined that the object of the agreement was work acquisition, not work preservation.

Similarly, *Pipefitters* involved an agreement between a subcontractor and a pipefitters' union that pipe threading and cutting were to be performed on the jobsite. Relying on the agreement, the union refused to install climate-control units whose internal piping had been cut, threaded, and installed at the factory. The Board held that the provision was a lawful work preservation agreement, but that the refusal to handle the prepiped units was an unfair labor practice because the units had been specified by the general contractor and the subcontractor had no power to assign the employees the work they sought. Neither the Court of Appeals nor this Court questioned the validity of the work preservation clause but for the fact that it was enforced against an employer who could not control the work. Under the Board's current approach, however, the "work" would have been "cutting, threading, and installing pipe in climate-control units at the factory." Since the bargaining unit employees had never performed that work, there would have been no reason to reach the "right of control" issue.

Thus the Board's determination that the work of longshoremen has historically been the loading and unloading of ships should be only the beginning of the analysis. The next step is to look at how the contracting parties sought to preserve that work, to the extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members.[23] This case pre-

[23] We need hardly add that the analysis is not, as the parties have sometimes seemed to suggest, simply a matter of deciding whether a con-

sents a much more difficult problem than either *National Woodwork* or *Pipefitters* because the union did not simply insist on doing the work as it had always been done and try to prevent the employers from using container ships at all—though such an approach would have been consistent with *National Woodwork* and *Pipefitters*. Instead, ILA permitted the great majority of containers to pass over the piers intact, reserving the right to stuff and strip only those containers that would otherwise have been stuffed or stripped locally by anyone except the beneficial owner's employees. The legality of the agreement turns, as an initial matter, on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere.[24]

Respondents assert that the stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier.[25] Petitioners-intervenors, on the other hand, argue that containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshore-

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tainer is more like the hold of a ship or more like a big box. The usefulness of a container lies precisely in the fact that it may function as an integral part of the hold while it is aboard a vessel, as a trailer when it is transported by truck, and as part of a railroad car when it is carried by rail.

[24] Obviously, the result will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns. Thus the claim that if the Rules are upheld the union would be able to follow containers around the country and assert the right to stuff and strip them far inland is groundless. That work would bear an entirely different relation to traditional longshore work, and would require a wholly different analysis.

[25] They contend that there is no significant economic advantage to be gained from containerization over break-bulk handling at the pier when the stuffing and stripping is to be done locally.

men and employees of motor carriers has been completely eliminated.

These questions are not appropriate for initial consideration by reviewing courts. They are properly raised before the Board, whose determinations are, of course, entitled to deference. Since the Board has not had an opportunity to consider these questions in relation to a proper understanding of the work at issue, we will not address them here. We emphasize that neither our decision nor that of the Court of Appeals implies that the result of the Board's reconsideration of this case is foreordained.[26] Viewing the work allegedly to be preserved by the Rules from the proper perspective, the Board will be free to determine whether the Rules represent a lawful attempt to preserve traditional longshore work, or whether, instead, they are "tactically calculated to satisfy union objectives elsewhere," *National Woodwork*, 386 U. S., at 644. This determination will, of course, be informed by an awareness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace, see *id.*, at 641–642. Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs.

If the Board finds, on remand, that the Rules have a lawful work preservation objective, it will then, of course, be obliged

[26] The dissenting opinion of THE CHIEF JUSTICE proceeds on the assumption that we decide today the proper definition of the work in controversy, see *post*, at 528, and hold that the Rules are a lawful work preservation agreement, see *post*, at 525, 528–529. Our holding, we repeat, is that the Board's definition of the work in controversy was erroneous as a matter of law. The question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand.

to consider the charging parties' contention that CONASA members did not have the right to control the stuffing and stripping of containers. Because the Board held that the agreement was directed at work acquisition, rather than work preservation, it did not decide the right-to-control issue in this case. That issue remains open on remand. Therefore, and because the arguments of the parties were necessarily addressed to an erroneous conception of the work whose control was disputed,[27] any discussion of that issue here would be premature. Respondents have also argued that the employers, as common carriers who are subject to Government regulation and to the provisions of their own tariffs, shippers' bills of lading, and intermodal interchange agreements with motor carriers, have no legal right to withhold containers or container services from their customers on a selective basis, to condition access to the containers on compliance with the Rules, to seek indemnification from their customers for fines imposed under the Rules, or to enforce the Rules after the containers have been released to motor carriers. See, *e. g.*, Shipping Act, 1916, 46 U. S. C. § 801 *et seq.*; Intercoastal Shipping Act, 1933, 46 U. S. C. § 843 *et seq.*; *Sea-Land Service, Inc.—Proposed ILA Rules on Containers*, 20 F. M. C. 788 (1978), review pending, No. 78–1776 (CADC). These contentions present difficult and complex problems which are not properly before us.

We conclude that the Court of Appeals correctly held that the Board's definition of the work in controversy in this dispute was erroneous as a matter of law, and we therefore affirm the Court of Appeals' judgment vacating the Board's decisions,

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[27] It is plain that the outcome of the right-to-control test will be significantly affected by whether the work in controversy is viewed as the stuffing and stripping done at the off-pier facilities of truckers and consolidators by their own employees or as, for example, the stuffing and stripping of certain types of cargo from containers owned or leased by, and in the possession and control of, the shipping companies.

denying the applications for enforcement, and remanding to the Board for further proceedings.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

1974 Rules on Containers

CONASA–ILA RULES ON CONTAINERS

PREAMBLE

This Agreement made and entered into by and between the carrier and direct employer members of the CONASA Port Associations (hereinafter referred to collectively as "CONASA") and the International Longshoremen's Association, AFL–CIO ("ILA"), its Atlantic Coast District ("ACD") and its affiliated local unions in each CONASA port ("locals") covers all container work at a waterfront facility which includes but is not limited to the receiving and delivery of cargo, the loading and discharging of said cargo into and out of containers, the maintenance of containers, and the loading and discharging of containers on and off ships.

CONASA agrees that it will not directly perform work done on a container waterfront facility (as hereinafter defined) or contract out such work which historically and regularly has been and currently is performed by employees covered by CONASA–ILA Agreements, including CONASA–ILA craft agreements, unless such work on such container waterfront facility is performed by employees covered by CONASA–ILA Agreements.

RULES

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts which was performed at deepsea waterfront facilities. These rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea ILA labor. To assure compliance with the collec-

tive bargaining provisions, the following rules and regulations shall be applied uniformly in all CONASA Ports to all imports or export cargo in containers:

Definitions

(a) Loading a Container—means the act of placing cargo into a container.

(b) Discharging a Container—means the act of removing cargo from a container.

(c) Loading Containers on a vessel—means the act of placing containers aboard a vessel.

(d) Discharging Containers from a vessel—means the act of removing containers from a vessel.

(e) Waterfront facility—means a pier or dock where vessels are normally worked including a container compound operated by a carrier or direct employer.

(f) Qualified Shipper—means the manufacturer or seller having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt.

(g) Qualified Consignee—means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.

(h) Consolidated Container Load—means a container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

Rule 1—Containers To Be Loaded or Discharged by Deepsea ILA Labor

(a) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by deepsea ILA labor:

(1) Containers owned, leased or used by carriers (including containers on wheels and trailers), hereinafter

"containers", which contain consolidated container loads, which come from or go to any point within a geographic area of any CONASA port described by a 50-mile circle with its radius extending out from the center of each port (hereinafter "geographic area") or

(2) Containers which come from a single shipper which is not the manufacturer ("manufacturer's label") into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the "geographical area," or

(3) Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the "geographic area" and which is not warehoused in accordance with Rule 2 (b).

(b) Such ILA labor shall be paid and employed at deep-sea longshore rates under the terms and conditions of the deep-sea ILA labor agreement in each CONASA port, including the provisions for all fringe benefits and any and all other benefits receivable by deep-sea ILA craft workers in each such Port. No cargo shall be loaded into or discharged out of any container by ILA deep-sea labor more than once.

(c) All export consolidated cargo, described in 1 (a)(1) and (2) above, shall be received at the waterfront facility by deep-sea ILA labor and such cargo shall be loaded into a container at the waterfront facility for loading aboard ship.

(d) All import consolidated cargo, described in 1 (a)(1) and (3) above, shall be discharged from the container and the cargo placed on the waterfront facility where it will be delivered and picked up by each consignee.

(e) No carrier or direct employee shall supply its containers to any consolidator or de-consolidator. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all Rule 1 Containers be loaded or discharged at a waterfront facility.

Rule 2—Containers Not to be Loaded or Discharged by ILA Labor

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A. Export Cargo:

(1) All cargo loaded in containers outside the "geographic area".

(2) Containers loaded with cargo at a qualified shipper's facility with its own employees.

(3) Containers loaded with the cargo of a single manufacturer (manufacturer's label).

(4) Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

B. Import Cargo:

(1) All cargo discharged from containers outside the "geographic area".

(2) Containers discharged at a qualified consignee's facility by its own employees.

(3) Consolidated container loads of mail, household effects of a person who is relocating his place of business, with no other type of cargo in the container, or personal effects of military personnel.

(4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions.

1. The container cargo is warehoused at a bona fide public warehouse.

2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days, and;

3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to

such goods has not been transferred from the qualified consignee to another.

The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or deconsolidator.

Rule 3—Batching

When an employer-member or carrier uses a trucker to remove or deliver containers in batches, or in substantial number, from or to a terminal to another place of rest (outside of its terminal) where containers are stored pending their delivery to a consignee (or after being received from a shipper and while waiting the arrival of a ship), for the purpose of reducing the work jurisdiction of the ILA or any of its crafts, such use is deemed to be batching and an evasion of these Rules in violation of the CONASA–ILA contract.

Rule 4—Headload

Where a single qualified shipper sends an export container which contains all of his own cargo to a waterfront facility and such container is not full, the carrier or direct employer may load this container with additional cargo at the waterfront facility. On import cargo, the carrier or direct employer may discharge any such additional cargo and send the remaining cargo in the container to the qualified consignee. The loading or discharging of cargo at ILA ports shall be performed at a waterfront facility by deepsea ILA labor.

Rule 5—Overland Movement of Containers from CONASA Port to Non-CONASA Port

If a carrier moves containers from a CONASA Port to a non-CONASA Port for the purpose of evading the Rules on Containers, the carrier is in violation of the CONASA–ILA Agreement. If the cargo is being moved to a non-CONASA–ILA Port in the normal course of business, and not for the purpose of evasion, then such movement is not a violation.

Rule 6—Importers Advertising Evasion of Rules

The circulation, in writing, by importers of methods developed by them to evade the Rules on Containers by issuing single bills of lading on what are in fact consolidated container loads shall be deemed a violation and all CONASA–ILA Container Committees shall be advised to stop such evasion at the waterfront facilities.

Rule 7—No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply:

(a) Geographic Area—Agreement in the Port to the geographic area as provided in Rule 1 is based on present consolidated movement patterns in the port. Should any person, firm or corporation for the purpose of evading the provisions of the Rules on Containers, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside said agreed upon geographic area, then either party may raise the question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of the Rules on Containers, then said point shall be deemed to be within the said geographic area for the purpose of these rules.

(b) Containers Owned, Leased or Used—Containers owned, leased or used by companies which are affiliated either directly or through a holding company with a carrier or a direct employer shall be deemed to be containers owned, leased or used by a carrier or direct employer. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the carrier or direct employer, its parent, or stockholders of either of them.

(c) Liquidated Damages—Failure to load or discharge a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 1 and Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been loaded or discharged under the Rules, then the carrier or its agent or direct employer shall pay, to the joint Container Royalty Fund, liquidated damages of $1,000 per container which should have been loaded or discharged. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in Rule 9 (a) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

(d) Any facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility.

Rule 8—Renegotiation and Cancellation—No Arbitration

These Rules shall be in effect for the term of the CONASA–ILA Agreement, provided, however, that either party shall have the right to cancel the Rules on Containers at any time on or after December 1, 1974, on thirty (30) days written

notice of a desire to renegotiate the provisions of these Rules. Negotiations shall be held during such thirty (30) day period and if the parties are unable to agree by the end of such period, these Rules shall be deemed cancelled. Thereafter, the ILA shall have the right to refuse to handle containers and CONASA shall have the right to refuse to hire employees under the said Rules. The negotiations referred to above shall, under no condition, be subject to the grievance or arbitration provisions of any CONASA–ILA Agreement.

Rule 9—Enforcement of the Rules on Containers

To assure effective, fair and non-discriminatory enforcement of the above Rules, the following regulations shall apply:

(a) A Committee in each CONASA port represented equally by management and union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these Rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by Rule 8 hereof. A joint committee, known as the CONASA–ILA Container Committee, represented equally by management and labor and made up of representatives (to be mutually agreed upon) from each CONASA Port, namely, Boston, Rhode Island, New York, Philadelphia, Baltimore and Hampton Roads shall meet at least quarterly each year for the purpose of insuring uniformity in the interpretation of these Rules.

(b) A Committee of carriers, together with CONASA–ILA Container Committee will develop uniform documentation which shall be required to be prepared and maintained by all carriers in order to readily identify all Rule 1 containers which are subject to loading or discharging by deepsea ILA labor. It shall be the obligation of employer-members to clearly mark each con-

tainer's documentation as to whether or not it is a Rule 1 container, which shall be loaded or discharged. If a container's documentation is not clearly marked, it shall be deemed a Rule 1 container and it shall be loaded or discharged by deepsea ILA labor at the waterfront facility. With respect to all containers received at or delivered from the waterfront facility, a record of the same shall be made by ILA Checkers or Clerks. All carriers will distribute to all other carriers any and all information and devices which are being used by any person to circumvent the Rules on Containers. Any carrier whose attention is brought to a violation of the Rules shall immediately cease such violation and report the matter to the appropriate CONASA–ILA Container Committee and to the policing agency provided in (e) below in its port.

(c) Every import container destined to a point within 50-miles of a CONASA Port shall be delivered only on a delivery order. Every export container coming from a point within 50-miles of a CONASA Port shall be received only on a dock/cargo receipt. Such delivery orders and dock/cargo receipts shall certify the place of delivery and origin of the container, the name or names of the person to whom the cargo is being delivered and from which it is shipped, the identity of the owner of the cargo, weight of the cargo, identity of the cargo and the origin and final destination of the container. Copies of such delivery orders and dock/cargo receipts shall be available to the local port Container Committee and the policing agency provided for in (e) below.

(d) The Container Committee in each CONASA Port shall promulgate to all carriers and direct employers, and to the Container Committees in each CONASA Port, any and all interpretations of the Rules on Containers as and when they are made. This will include uni-

form interpretations as and when they are issued. The CONASA–ILA Container Committee shall also promulgate uniform interpretations to local port Container Committees, as and when they are issued.

(e) Policing Agency—Each CONASA Port shall establish a method of policing and enforcing these Rules on a uniform and non-discriminatory basis. No such method shall be implemented until presented to and approved by the joint CONASA–ILA Container Committee.

Rule 10—Container Royalty Payments

The two Container Royalty payments required by the CONASA–ILA collective bargaining agreements shall be payable only once in the Continental United States. They shall be paid in that ILA Port where the container is first handled by ILA longshore labor at longshore rates. The second container royalty payment (provided by paragraph 6 of the 1971–1974 CONASA–ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS join, dissenting.

This case turns on the definition of the work in controversy. If viewed exclusively from the perspective of the ILA, without regard to other aspects of the transportation industry or to the evolutionary changes in methods of doing business, the work can be characterized broadly as the loading and unloading of vessels; that gives the contract Rules on Containers a plausible work preservation objective sufficient to escape what

would otherwise be a violation of § 8 (e) of the National Labor Relations Act. If viewed from the perspective of the consolidators and motor carriers—many of whose employees are also union members—the objective is not preservation of traditional longshoremen's work but a claim to work historically and traditionally performed by teamsters, truckers, and similar inland laborers. Which of these perspectives is chosen, in turn, depends on the view taken of the nature and function of a "container."

This is where the Court's analysis runs astray. To the Court, the work-in-controversy problem in the instant case is simply analogous to that involved in *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612 (1967), or *NLRB* v. *Pipefitters*, 429 U. S. 507 (1977), although the Court disclaims this. Compare *ante*, at 508–509, with *ante*, at 509–510. But viewing the work in controversy, as we should, "under all the surrounding circumstances," *National Woodwork*, *supra*, at 644, the Court's analysis simply will not "wash." A door may be a door in the carpenter's world, and a pipe may be a pipe to the plumber, but a "container" can be seen as sometimes like the hold of a ship, sometimes like the trailer of a truck—and sometimes an independent component.

Because of the many functions of a container, it affects both sea and land transportation systems. The Court apparently recognizes the complexities involved, see *ante*, at 509–510, n. 23, but does not seem to respond to the logical inferences as did the Board, which has a vast reservoir of experience with day-to-day industrial operations. We cannot blink the reality of this technological innovation, nor can we, as the Court does, focus merely on one aspect of the work it has affected. The Board understood the complexities involved here; consequently, it invalidated only that part of the Rules on Containers whose primary effect was to influence the loading and unloading of containers functioning away from the pier as truck trailers. See 231 N. L. R. B. 351 (1977) and 236 N. L. R. B. 525 (1978). The Court's failure to appreciate

this distinction and unwillingness to concede its significance underscores the reason why reviewing courts must give weight to the Board's long and intimate experience with the workings of the industries implicated. See, *e. g.*, *Pipefitters*, *supra*, at 531–532. Calling the issue one of law does not make it so.

The ILA argues that a container should be viewed as the functional equivalent of the hold of a ship. See, *e. g.*, Brief for Respondent ILA 4. Superficially it can be made to appear that this Court has acquiesced in such an approach, but only in the context of discussing questions arising under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 270–271 (1977); *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69 (1979). Even in that narrow context, a careful reading of the Court's statements shows that what the Court characterized as "maritime employment" within the meaning of the LHWCA was the work of one who "moves cargo between ship and land transportation." *Pfeiffer*, *supra*, at 84. This characterization points toward the key to the proper view in this case—that the function of a container changes as it moves through the transportation system.

Prior to containerization, both consolidators and truckers functioned as part of the transportation industry. Teamsters and others loaded the vehicles used by the truckers and consolidators. When these vehicles reached the pier, longshoremen took over the task of moving the cargo onto the pier or into the ship's hold. Longshoremen also handled inbound cargo from the hold of the ship to the pier and until placed on a land-based truck. After that, any handling of the contents of the truck away from the pier was the work of others than longshoremen. See *International Longshoremen's Assn. (Consolidated Express, Inc.)*, 221 N. L. R. B. 956, 959 (1975), enf'd, 537 F. 2d 706 (CA2 1976), cert. denied 429 U. S. 1041 (1977); 231 N. L. R. B., at 359, 365.

After the advent of containerization, truckers and consolidators still perform their traditional functions. 221

N. L. R. B., at 959; 231 N. L. R. B., at 365. Their employees still load and unload the vehicles they use, 221 N. L. R. B., at 960, but with containerization the cargo-carrying part of those vehicles is the removable container. When such a vehicle with outbound cargo reaches the pier, there is no need whatever for anyone to "unpack" it; the container may itself be lifted and placed in the hold of the waiting ship, which is designed so that the container fits it as it did the prefitted bed of the truck chassis. Similarly, a container carrying inbound freight is hoisted from the hold of the ship and placed on a truck chassis hooked up to a tractor; the tractor-trailer is driven away from the pier, and the container is then part of land transportation.

To me, the work in controversy has two aspects—loading and unloading ships and loading and unloading trucks. Under this view, the Rules on Containers at issue would be valid insofar as they regulate what happens to containers—as distinguished from their contents—while they are on the pier; but those Rules are invalid insofar as they attempt, through fines placed on the shipowner/employers, to regulate what happens to containers once they have left the pier for overland transportation.

The Court finds it sufficient to say that the main object of the Rules on Containers is to preserve the traditional longshore work of moving cargo between ship and land transportation. That is too simplistic a view; it closes the eyes to the other aspects of the transportation industry and to the evolution of methods of handling freight. For our purposes, the relevant work in controversy is that involved in the part of the Rules affected by the Board's orders and now here for review. It seems clear to me—as the Board saw—that the work which these Rules seek to control is the work of loading and unloading land-based transportation—the containers functioning as truck trailers—away from the pier; the record supports the Board's conclusion that such work has never been performed by longshoremen. See, *e. g.*, 231 N. L. R. B.,

at 365. Through this aspect of the Rules, the ILA turns reality on its head and seeks to take work from those who have traditionally performed it.[1] This is prohibited by § 8 (e).

The ILA complains that the loading and unloading of land transportation which takes place away from the pier could be done by them on the pier with equal efficiency. See Tr. of Oral Arg. 49, 51. But everyone except the ILA has found, from experience, that this is not true, and in any event this assertion shows that the ILA is trying to acquire the work of others. Because the modern, efficient mechanism of containerization has affected their work at the pier, the ILA is using the Rules to reach out and bring to the pier work which employees of land-based transporters have always performed. Under the work preservation doctrine, the longshoremen may seek to mitigate the effect on them of this new technology, but they may not lawfully do so by reaching out for work which they have not traditionally performed. It is a gross perversion of the work preservation doctrine to permit such conduct; that doctrine, as applied here, ceases to be a shield to protect work and becomes a sword to cut work away from those who have traditionally performed it.

When a prepacked container which "violates" the Rules is taken off its trailer at the pier, the ILA demands that its members be paid for the utterly useless task of removing the contents and then repacking them, or alternatively that a fine be imposed on the shipping company which owns or leased the container.[2] This is nothing less than an invidious

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[1] This is thus far from a classic case of "labor" versus "management." Here, one segment of labor seeks to take work away from another segment, and to impose a "featherbedding" fine on employers as an enforcement device.

[2] It is natural, of course, for individuals—and unions—to want to "preserve" work which by long practice has been "theirs." But there must be a balancing of this urge with the need for innovation and change in methods that spell progress and reduce consumer cost. In the complaints of the ILA, one hears the echoes of the complaints of stablekeepers and

form of "featherbedding" to block full implementation of modern technological progress. Allowing compromises in the interest of those whose jobs are affected is one thing; but what the Court sanctions today is quite another—taking work from non-ILA members to provide economically useless work for ILA members.

The Court of Appeals was obviously ill at ease with its decision and sought comfort by trying to restrict its scope through the intimation that its holding was limited to the presently claimed 50-mile limit.[3] That court deceived itself, and the Court today puts on the same blinders in asserting that it is "groundless" to claim that the logic of its decision would allow the union "to follow containers around the country and assert the right to stuff and strip them far inland. . . ." *Ante*, at 510, n. 24. Should this occur, the Court states, "[t]hat work would bear an entirely different relation to traditional longshore work, and would require a wholly different analysis." *Ibid.*

It does not "reduce to absurdity," see n. 3, *supra*, to ask why 51 or 100 miles "would require a wholly different analysis." Following the Court's own strained reasoning, the work in controversy would still be the same—the longshoremen's

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harness manufacturers when the automobile first gained wide acceptance. With practices such as those held permissible in this case, innovation and change in the utilization of modern machinery, methods, and labor will be retarded. Obsolete machinery and obsolete methods will tend to be used because industry will not be anxious to risk investment capital on labor-saving, cost-reducing methods and mechanisms if, by doing so, it must pay in tribute for the privilege a penalty that offsets the savings.

[3] That court's opinion recites: "It is not difficult to imagine a party unhappy with this court's decision today subjecting that decision to the following exercise in *reductio ad absurdum:* Under the court's ruling, cannot longshoremen literally chase containers around the country, demanding the right to stuff and strip them? There is a short answer: No. Our decision does not radiate beyond the Rules on Containers, which are restricted in terms to a 50-mile area around each port." 198 U. S. App. D. C. 157, 177, n. 177, 613 F. 2d 890, 910, n. 177 (1979).

work on the pier. Since they have never worked off the pier, the contested work could be nothing else. And, under the Court's analysis, "[t]he effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer." *Ante*, at 507, n. 22.

By implying that the relevant work in controversy would suddenly shift from the pier to land if it occurred beyond the arbitrary 50-mile limit, the Court's opinion exposes its own error, much as the Court of Appeals comforted itself that the 50-mile point was the limit.[4] Since longshoremen's work is and has always been confined to work "on the pier," the actual work in controversy here bears the same relation to traditional longshore work as it would if it were performed 500 miles away. It simply is *not* traditional longshore work. By looking only at one aspect of the problem and refusing to look at the whole, as the Board did, the Court's holding recalls the blind person who, holding an elephant's tail, concludes it is a snake. The Court fails, as did the Court of Appeals, to explain why a 50-mile limit is acceptable while 50-plus would not be so, and hence sanctions a widening of the work preservation exception that completely swallows the rules of §§ 8 (e) and 8 (b)(4)(B).

It is argued that the current Rules represent a collectively bargained compromise as to the ILA's asserted right to strip and stuff all containers (or at least all owned or leased by the shipping companies) at the pier, but the fact that an agree-

[4] Even under the current Rules, the 50-mile point is not strictly the limit. If a consolidator or trucker operating within the 50-mile limit relocates or opens new operations outside the limit, the parties to the Rules may decide nonetheless that the sanctions of the Rules are to apply. See Rule 7 (a) of the 1974 Rules on Containers, reprinted in the Court's appendix, *ante*, at 518.

ment was collectively bargained cannot save it if its object is to violate the law. As the Board decreed, that part of the Rules which attempts to regulate, through the economic pressure of fines on the shipping companies, the loading and unloading of land transportation away from the pier is invalid under §§ 8 (e) and 8 (b)(4)(B) of the NLRA.

The Board's findings are supported by substantial evidence on the record considered as a whole, cf. *Pipefitters*, 429 U. S., at 531, and accordingly I would reverse the judgment of the Court of Appeals and remand with directions to enforce the Board's orders.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 79–134. Argued March 17, 1980—Decided June 20, 1980

Held: An order of appellee New York Public Service Commission that prohibits the inclusion by appellant (and other public utility companies) in monthly bills of inserts discussing controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments and thus is invalid. Cf. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765. Pp. 533–544.

(a) The restriction on bill inserts cannot be upheld on the ground that appellant, as a corporation, is not entitled to freedom of speech. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston* v. *Bellotti*, *supra*, at 777. Pp. 533–535.

(b) Nor is the state action here a valid time, place, or manner restriction. While the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication has been recognized, such regulations may not be based upon either the content or subject matter of speech. Appellee here does not pretend that its action is unrelated to the content of bill inserts, inserts that present information to consumers on certain subjects, such as energy conservation measures, being allowed but inserts that discuss public controversies being forbidden. Pp. 535–537.

(c) The prohibition against inserts is not a permissible subject-matter regulation merely because it applies to all discussion of political controversies, whether pro or con. The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic, and the regulation at issue here does not fall within the narrow exceptions to the general prohibition against subject-matter distinctions. *Greer* v. *Spock*, 424 U. S. 828, and *Lehman* v. *Shaker Heights*, 418 U. S. 298, distinguished. Pp. 537–540.

(d) Furthermore, the state action here is not valid as a narrowly drawn prohibition serving a compelling state interest. The prohibition

cannot be justified as being necessary to avoid forcing appellant's views on a captive audience, since customers may escape exposure to objectionable material simply by throwing the bill insert into a wastebasket. Nor is the prohibition warranted as being necessary to allocate, in the public interest, the limited space in the billing envelope, there being nothing in the record to show that the bill inserts at issue would preclude the inclusion of other inserts that appellant might be ordered lawfully to include in the billing envelope. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, distinguished. And the prohibition cannot be justified as being necessary to ensure that ratepayers do not subsidize the cost of the bill inserts, since there is no basis on the record to assume that appellee could not exclude the cost of the inserts from the utility's rate base. Pp. 540–543.

47 N. Y. 2d 94, 390 N. E. 2d 749, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 544. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 544. BLACKMUN, J., filed a dissenting opinion, in Parts I and II of which REHNQUIST, J., joined, *post*, p. 548.

Joseph D. Block argued the cause for appellant. With him on the briefs was *Peter P. Garam*.

Peter H. Schiff argued the cause for appellee. With him on the brief was *Howard J. Read*.*

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*Briefs of *amici curiae* urging reversal were filed by *Walter L. Stratton* for the American Association of Advertising Agencies, Inc.; by *Stanley T. Kaleczyc* for the Chamber of Commerce of the United States of America; by *Burt Neuborne* for Long Island Lighting Co.; by *Edward H. Dowd*, *Myrna P. Field*, and *John Cannon* for the Mid-Atlantic Legal Foundation et al.; by *Edwin P. Rome* and *William H. Roberts* for Mobil Corp.; by *Malcolm H. Furbush*, *Joseph I. Kelly*, *Robert L. Harris*, *Gordon Pearce*, *Guenter S. Cohn*, *Timothy W. Tower*, *John Bury*, and *Leslie Christian Hauck* for Pacific Gas and Electric Co. et al.; and by *Daniel J. Popeo* for the Washington Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Kristin Booth Glen* and *Melvin L. Wulf* for the Natural Resources Defense Council et al.; and by *Harold I. Abramson* and *John C. Esposito* for the New York State Consumer Protection Board et al.

Briefs of *amici curiae* were filed by *Cameron F. MacRae* for the Edison

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the First Amendment, as incorporated by the Fourteenth Amendment, is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts discussing controversial issues of public policy.

I

The Consolidated Edison Company of New York, appellant in this case, placed written material entitled "Independence Is Still a Goal, and Nuclear Power Is Needed To Win the Battle" in its January 1976 billing envelope. The bill insert stated Consolidated Edison's views on "the benefits of nuclear power," saying that they "far outweigh any potential risk" and that nuclear power plants are safe, economical, and clean. App. 35. The utility also contended that increased use of nuclear energy would further this country's independence from foreign energy sources.

In March 1976, the Natural Resources Defense Council, Inc. (NRDC), requested Consolidated Edison to enclose a rebuttal prepared by NRDC in its next billing envelope. *Id.*, at 45–46. When Consolidated Edison refused, NRDC asked the Public Service Commission of the State of New York to open Consolidated Edison's billing envelopes to contrasting views on controversial issues of public importance. *Id.*, at 32–33.

On February 17, 1977, the Commission, appellee here, denied NRDC's request, but prohibited "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power." *Id.*, at 50. The Commission explained its decision in a Statement of Policy on Advertising and Promotional Practices of Public Utilities issued on February 25, 1977. The Commission concluded

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Electric Institute; and by *William W. Becker* for the New England Legal Foundation.

that Consolidated Edison customers who receive bills containing inserts are a captive audience of diverse views who should not be subjected to the utility's beliefs. Accordingly, the Commission barred utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." App. to Juris. Statement 43a. The Commission did not, however, bar utilities from sending bill inserts discussing topics that are not "controversial issues of public policy." The Commission later denied petitions for rehearing filed by Consolidated Edison and other utilities. *Id.*, at 59a.

Consolidated Edison sought review of the Commission's order in the New York state courts. The State Supreme Court, Special Term, held the order unconstitutional. 93 Misc. 2d 313, 402 N. Y. S. 2d 551 (1978). But the State Supreme Court, Appellate Division, reversed, 63 App. Div. 2d 364, 407 N. Y. S. 2d 735 (1978), and the New York Court of Appeals affirmed that judgment. 47 N. Y. 2d 94, 390 N. E. 2d 749 (1979). The Court of Appeals held that the order did not violate the Constitution because it was a valid time, place, and manner regulation designed to protect the privacy of Consolidated Edison's customers. *Id.*, at 106–107, 390 N. E. 2d, at 755. We noted probable jurisdiction, 444 U. S. 822 (1979). We reverse.

II

The restriction on bill inserts cannot be upheld on the ground that Consolidated Edison is not entitled to freedom of speech. In *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), we rejected the contention that a State may confine corporate speech to specified issues. That decision recognized that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.*, at 777. Because the state action limited protected speech, we concluded that the

regulation could not stand absent a showing of a compelling state interest. *Id.*, at 786.[1]

The First and Fourteenth Amendments guarantee that no State shall "abridg[e] the freedom of speech." See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 500–501 (1952). Freedom of speech is "indispensable to the discovery and spread of political truth," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).[2] The First and Fourteenth Amendments remove "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . ." *Cohen* v. *California*, 403 U. S. 15, 24 (1971).[3]

This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thornhill* v.

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[1] Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, *post*, at 566–568. We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. See, *e. g.*, *Friedman* v. *Rogers*, 440 U. S. 1 (1979); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 763–765 (1976). Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. See generally *Public Media Center* v. *FCC*, 190 U. S. App. D. C. 425, 428, 429, 587 F. 2d 1322, 1325, 1326 (1978); *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 127–129, 131 Cal. Rptr. 350, 352–353 (1976).

[2] Freedom of speech also protects the individual's interest in self-expression. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12 (1978); see T. Emerson, The System of Freedom of Expression 6 (1970).

[3] See also A. Meiklejohn, Political Freedom 35–36 (1965).

Alabama, 310 U. S. 88, 101–102 (1940); see *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

III

The Commission's ban on bill inserts is not, of course, invalid merely because it imposes a limitation upon speech. See *First National Bank of Boston* v. *Bellotti*, *supra*, at 786. We must consider whether the State can demonstrate that its regulation is constitutionally permissible. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

A

This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication. See *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 93 (1977); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 771 (1976). See also *Kovacs* v. *Cooper*, 336 U. S. 77, 104 (1949) (Black, J., dissenting). In *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), this Court upheld a licensing requirement for parades through city streets. The Court recognized that the regulation, which was based on time, place, or manner criteria, served the municipality's legitimate interests in regulating traffic, securing public order, and insuring that simultaneous parades did not pre-

vent all speakers from being heard. *Id.*, at 576. Similarly, in *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), we upheld an antinoise regulation prohibiting demonstrations that would disturb the good order of an educational facility. The narrowly drawn restriction constitutionally advanced the city's interest "in having an undisrupted school session conducive to the students' learning. . . ." *Id.*, at 119. Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares at 2 a. m. disturbs neighborhood tranquility.

A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko* v. *Maryland*, 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in result). As a consequence, we have emphasized that time, place, and manner regulations must be "applicable to all speech irrespective of content." *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209 (1975); see *Carey* v. *Brown*, *ante*, at 470. Governmental action that regulates speech on the basis of its subject matter "'slip[s] from the neutrality of time, place, and circumstance into a concern about content.'" *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 99 (1972), quoting Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 29. Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.[4]

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[4] See also *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 93–94 (1977); *Papish* v. *University of Missouri Curators*, 410 U. S. 667, 670 (1973) (*per curiam*).

The Commission does not pretend that its action is unrelated to the content or subject matter of bill inserts. Indeed, it has undertaken to suppress certain bill inserts precisely because they address controversial issues of public policy. The Commission allows inserts that present information to consumers on certain subjects, such as energy conservation measures, but it forbids the use of inserts that discuss public controversies. The Commission, with commendable candor, justifies its ban on the ground that consumers will benefit from receiving "useful" information, but not from the prohibited information. See App. to Juris. Statement 66a–67a. The Commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation.

B

The Commission next argues that its order is acceptable because it applies to all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the Commission contends, is related to subject matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the Commission asserts that it does not unconstitutionally suppress freedom of speech.

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley, supra,* at 95; see *Cox* v. *Louisiana,* 379 U. S. 536, 580–581 (1965) (opinion of Black, J.). In *Mosley,* we held that a municipality could not exempt labor picketing from a general prohibition on picketing at a school even though the ban would have reached both pro- and anti-union demonstrations. If the marketplace

of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating . . . ." 408 U. S., at 96. See also *Erznoznik* v. *City of Jacksonville, supra,* at 214–215; *Tinker* v. *Des Moines School District,* 393 U. S. 503, 510–511 (1969). To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Nevertheless, governmental regulation based on subject matter has been approved in narrow circumstances.[5] The court below relied upon two cases in which this Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated. 47 N. Y. 2d, at 107, 390 N. E. 2d, at 755. In *Greer* v. *Spock,* 424 U. S. 828 (1976), we held that the Federal Government could prohibit partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects. See *id.,* at 838, n. 10.[6] In *Lehman* v. *Shaker*

[5] For example, when courts are asked to determine whether a species of speech is covered by the First Amendment, they must look to the content of the expression. See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n, post,* at 561–563 (commercial speech); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 340 (1974) (libel); *Miller* v. *California,* 413 U. S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572–573 (1942) (fighting words). Compare *FCC* v. *Pacifica Foundation,* 438 U. S. 726, 746–747 (1978) (opinion of STEVENS, J.), and *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50, 70–71 (1976) (opinion of STEVENS, J.), with *FCC* v. *Pacifica Foundation, supra,* at 761 (opinion of POWELL, J.), 762–763 (BRENNAN, J., dissenting), and *Young* v. *American Mini Theatres, Inc., supra,* at 87 (STEWART, J., dissenting) (indecent speech).

[6] The necessity for excluding partisan speech was based upon the traditional policy "of keeping official military activities . . . wholly free of entanglement with partisan political campaigns of any kind." 424 U. S., at 839. Thus, the Court's decision construed the public right of access in light of "the unique character of the Government property upon which the expression is to take place." *Id.,* at 842 (POWELL, J., concurring).

Heights, 418 U. S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court similarly concluded that a city transit system that rented space in its vehicles for commercial advertising did not have to accept partisan political advertising. The municipality's refusal to accept political advertising was based upon fears that partisan advertisements might jeopardize long-term commercial revenue, that commuters would be subjected to political propaganda, and that acceptance of particular political advertisements might lead to charges of favoritism. *Id.*, at 302, 304.[7]

Greer and *Lehman* properly are viewed as narrow exceptions to the general prohibition against subject-matter distinctions. In both cases, the Court was asked to decide whether a public facility was open to all speakers.[8] The plurality in *Lehman* and the Court in *Greer* concluded that partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.

The analysis of *Greer* and *Lehman* is not applicable to the Commission's regulation of bill inserts. In both cases, a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the

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[7] Mr. Justice Douglas, who concurred in the judgment in *Lehman*, did not view "the content of the message as relevant either to petitioner's right to express it or to the commuters' right to be free from it." 418 U. S., at 308. Rather, Mr. Justice Douglas upheld the municipality's actions because commuters were a captive audience. *Id.*, at 306–308. The Consolidated Edison customers who receive bill inserts are not a captive audience. See *infra*, at 541–542. Four Justices dissented in *Lehman* on the ground that the municipality could not discriminate among advertisers. 418 U. S., at 308, 309 (BRENNAN, J., joined by STEWART, MARSHALL, and POWELL, JJ., dissenting).

[8] *Lehman* and *Greer* represent only one category of this Court's cases dealing with rights of access to governmental property. Compare *Tinker* v. *Des Moines School District*, 393 U. S. 503, 512–513 (1969), and *Hague* v. *CIO*, 307 U. S. 496, 515–516 (1939) (opinion of Roberts, J.), with *Adderley* v. *Florida*, 385 U. S. 39 (1966).

Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy. The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. See *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) (*per curiam*). But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

C

Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. See *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 786; *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*). See also *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960).[9] The Commission argues finally that its prohibition is necessary (i) to avoid forcing Consolidated Edison's views on a captive audience, (ii) to allocate limited resources in the public interest, and (iii) to en-

[9] The Commission contends that its order should be judged under the standard of *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968), because the order "is only secondarily concerned with the subject matter of Consolidated Edison communications. . . ." Brief for Appellee 9, n. 3. The *O'Brien* test applies to regulations that incidentally limit speech where "the governmental interest is unrelated to the suppression of free expression. . . ." 391 U. S., at 377. The bill insert prohibition does not further a governmental interest unrelated to the suppression of speech. Indeed, the court below justified the ban expressly on the basis that the speech might be harmful to consumers. 47 N. Y. 2d 94, 106–107, 390 N. E. 2d 749, 755 (1979).

sure that ratepayers do not subsidize the cost of the bill inserts.

The State Court of Appeals largely based its approval of the prohibition upon its conclusion that the bill inserts intruded upon individual privacy.[10] The court stated that the Commission could act to protect the privacy of the utility's customers because they have no choice whether to receive the insert and the views expressed in the insert may inflame their sensibilities. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755. But the Court of Appeals erred in its assessment of the seriousness of the intrusion.

Even if a short exposure to Consolidated Edison's views may offend the sensibilities of some consumers, the ability of government "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California*, 403 U. S., at 21. A less stringent analysis would permit a government to slight the First Amendment's role "in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston* v. *Bellotti*, *supra*, at 783; see *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Lamont* v. *Postmaster General*, 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring). Where a single speaker communicates to many listeners, the First Amend-

[10] The State Court of Appeals also referred to the alternative means by which Consolidated Edison might promulgate its views on controversial issues of public policy. Although a time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers, see *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S., at 93, we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression. See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S., at 757, n. 15; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 556 (1975); *Spence* v. *Washington*, 418 U. S. 405, 411, n. 4 (1974) (*per curiam*).

ment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.

Passengers on public transportation, see *Lehman* v. *Shaker Heights*, 418 U. S., at 307–308 (Douglas, J., concurring in judgment), or residents of a neighborhood disturbed by the raucous broadcasts from a passing sound truck, cf. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), may well be unable to escape an unwanted message. But customers who encounter an objectionable billing insert may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California*, *supra*, at 21. See *Spence* v. *Washington*, 418 U. S. 405, 412 (1974) (*per curiam*). The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.[11]

The Commission contends that because a billing envelope can accommodate only a limited amount of information, political messages should not be allowed to take the place of inserts that promote energy conservation or safety, or that remind consumers of their legal rights. The Commission relies upon *Red Lion Broadcasting Co.* v. *FCC*, *supra*, in which the Court held that the regulation of radio and television broadcast frequencies permits the Federal Government to exercise unusual authority over speech. But billing en-

[11] Although this Court has recognized the special privacy interests that attach to persons who seek seclusion within their own homes, see *Rowan* v. *Post Office Department*, 397 U. S. 728, 737 (1970), the arrival of a billing envelope is hardly as intrusive as the visit of a door-to-door solicitor. Yet the Court has rejected the contention that a municipality may ban door-to-door solicitors because they may invade the privacy of households. *Martin* v. *City of Struthers*, 319 U. S. 141, 146–147 (1943). Even if there were a compelling state interest in protecting consumers against overly intrusive bill inserts, it is possible that the State could achieve its goal simply by requiring Consolidated Edison to stop sending bill inserts to the homes of objecting customers. See *Rowan* v. *Post Office Department*, *supra*.

velopes differ from broadcast frequencies in two ways. First, a broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails. Thus, it cannot be said that billing envelopes are a limited resource comparable to the broadcast spectrum. Second, the Commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope. Unlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a "cacophony of competing voices." *Id.*, at 376.

Finally, the Commission urges that its prohibition would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts. But the Commission did not base its order on an inability to allocate costs between the shareholders of Consolidated Edison and the ratepayers. Rather, the Commission stated that "using bill inserts to proclaim a utility's viewpoint on controversial issues (*even when the stockholder pays for it in full*) is tantamount to taking advantage of a captive audience. . . ." App. to Juris. Statement 43a (emphasis added). Accordingly, there is no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base.[12] Mere speculation of harm does not constitute a compelling state interest. See *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 222–223 (1967).[13]

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[12] In its denial of petitions for rehearing, the Commission re-emphasized that it would impose the ban without regard to allocation of costs between shareholders and ratepayers. App. to Juris. Statement 67a, n. 1.

[13] The Commission also contends that ratepayers cannot be forced to support the costs of Consolidated Edison's bill inserts. Because the Commission has failed to demonstrate that such costs could not be allocated between shareholders and ratepayers, we have no occasion to decide whether the rule of *Abood* v. *Detroit Board of Education*, 431 U. S. 209

IV

The Commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments. The state action is neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest. Accordingly, the regulation is invalid. *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 795.

The decision of the New York Court of Appeals is

Reversed.

MR. JUSTICE MARSHALL, concurring.

I join the Court's opinion. I write separately to emphasize that our decision today in no way addresses the question whether the Commission may exclude the costs of bill inserts from the rate base, nor does it intimate any view on the appropriateness of any allocation of such costs the Commission might choose to make. *Ante*, at 543. The Commission did not rely on the argument that the use of bill inserts required ratepayers to subsidize the dissemination of management's view in issuing its order, and we therefore are precluded from sustaining the order on that ground. Cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); *FPC* v. *Texaco Inc.*, 417 U. S. 380, 397 (1974); *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249 (1972).

MR. JUSTICE STEVENS, concurring in the judgment.

Any student of history who has been reprimanded for talking about the World Series during a class discussion of the

(1977), would prevent Consolidated Edison from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy.

First Amendment knows that it is incorrect to state that a "time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Ante,* at 536. And every lawyer who has read our Rules,[1] or our cases upholding various restrictions on speech with specific reference to subject matter[2] must recognize the hyperbole in the dictum: "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley,* 408 U. S. 92, 95, quoted in part, *ante,* at 537. Indeed, if that were the law, there would be no need for the Court's detailed rejection of the justifications put forward by the State for the restriction involved in this case. See *ante,* Part III–C.

There are, in fact, many situations in which the subject matter, or, indeed, even the point of view of the speaker, may provide a justification for a time, place, and manner regulation. Perhaps the most obvious example is the regulation of oral argument in this Court; the appellant's lawyer precedes his

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[1] This Court's Rules 15, 16, 21, 22, 33, 34, 36 (effective June 30, 1980).

[2] See, *e. g., NLRB* v. *Retail Store Employees, post,* p. 607 (labor picketing at site of neutral third parties in labor dispute); *Ohralik* v. *Ohio State Bar Assn.,* 436 U. S. 447 (in-person solicitation of legal business, distinguished from other forms of legal advertising); *FCC* v. *Pacifica Foundation,* 438 U. S. 726 (indecent language in early afternoon radio broadcast); *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50 (zoning of "adult" movie theaters); *Greer* v. *Spock,* 424 U. S. 828 (partisan political speeches on military base); *Lehman* v. *Shaker Heights,* 418 U. S. 298 (political advertising on municipal transit system); *Schenck* v. *United States,* 249 U. S. 47, 52 (Holmes, J.): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." See also cases cited in *American Mini Theatres, supra,* at 67–71.

See generally Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo. L. J. 727 (1980); Note, *Pacifica Foundation v. FCC:* "Filthy Words," the First Amendment and the Broadcast Media, 78 Colum. L. Rev. 164 (1978).

adversary solely because he seeks reversal of a judgment.[3] As is true of many other aspects of liberty, some forms of orderly regulation actually promote freedom more than would a state of total anarchy.[4]

Instead of trying to justify our conclusion by reasoning from honeycombed premises, I prefer to identify the basis of decision in more simple terms. See *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 65–66. A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law . . . abridging the freedom of speech, or of the press."[5] A regulation that denies one group of persons the right to address a selected audience on "controversial issues of public policy" is plainly such a regulation.

The only justification for the regulation relied on by the New York Court of Appeals is that the utilities' bill inserts may be "offensive" to some of their customers.[6] But a com-

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[3] This Court's Rule 38.2. For the same reason, the color of his brief must be blue rather than red. Rule 33.2 (b) (3).

[4] "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox* v. *New Hampshire*, 312 U. S. 569, 574.

Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 375; *Cox* v. *Louisiana*, 379 U. S. 536, 554.

[5] The First Amendment provides:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

In a series of decisions beginning with *Gitlow* v. *New York*, 268 U. S. 652, this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the Federal Government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 500, n. 8.

[6] "When the insert espouses the utility's viewpoint on a controversial question, it is as likely to offend the sensibilities of the recipient as it is to elicit agreement. Government need not stand idly by and deny assistance

munication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive—perhaps because it is too loud [7] or too ugly in a particular setting.[8] Other

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to those who are inflamed by having a particular opinion foisted upon them." 47 N. Y. 2d 94, 106, 390 N. E. 2d 749, 755 (1979).

[7] *Kovacs* v. *Cooper*, 336 U. S. 77. See *id.*, at 97 (Frankfurter, J., concurring):

"So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society."

In his dissenting opinion, Mr. Justice Rutledge, referring to sound trucks in public places, stated that he had "no doubt of state power to regulate their abuse in reasonable accommodation, by narrowly drawn statutes, to other interests concerned in use of the streets and in freedom from public nuisance." *Id.*, at 105.

[8] See *FCC* v. *Pacifica Foundation*, *supra*, at 745–746 (opinion of STEVENS, J.):

"The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. *Roth* v. *United States*, 354 U. S. 476. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: '[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step

speeches, even though elegantly phrased in dulcet tones, are offensive simply because the listener disagrees with the speaker's message. The fact that the offensive form of some communication may subject it to appropriate regulation surely does not support the conclusion that the offensive character of an idea can justify an attempt to censor its expression. Since the Public Service Commission has candidly put forward this impermissible justification for its censorial regulation, it plainly violates the First Amendment.[9]

Accordingly, I concur in the judgment of the Court.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST as to Parts I and II joins, dissenting.

My dissent in this case in no way indicates any disapprobation on my part of the precious rights of free speech (so

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to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky* v. *New Hampshire*, 315 U. S., at 572." (Footnotes omitted.)

See also *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 84 (BRENNAN, J., dissenting): "[T]he obscenity of any particular item may depend upon nuances of presentation and the context of its dissemination. . . . *Redrup* [v. *New York*, 386 U. S. 767,] itself suggested that obtrusive exposure to unwilling individuals, distribution to juveniles, and 'pandering' may also bear upon the determination of obscenity."

[9] I recognize that in this Court the Commission has also tried to defend its regulation on the ground that it is entitled to allocate limited resources in the public interest and to guarantee that ratepayers do not subsidize these communicative activities. I agree with the Court's explanation of why there is no merit to either of these suggestions. See *ante*, at 542–543.

Even viewing the restriction as merely a neutral subject-matter regulation (controversial issues generally) as may have been intended initially by the Commission, rather than a restriction of a particular viewpoint (the utilities' opinions on those issues), I still believe it to be unconstitutional. For the use of the "controversial" nature of speech as the touchstone for its regulation threatens a value at the very core of the First Amendment, the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270.

carefully cataloged by the Court in its opinion) that are protected by the First and Fourteenth Amendments against repression by the State. My prior writings for the Court in the speech area prove conclusively my sensitivity about these rights and my concern for them. See, *e. g.*, *Bigelow* v. *Virginia*, 421 U. S. 809 (1975); *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). See also *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, *post*, p. 573 (opinion concurring in judgment).

But I cannot agree with the Court that the New York Public Service Commission's ban on the utility bill insert somehow deprives the utility of its First and Fourteenth Amendment rights. Because of Consolidated Edison's monopoly status and its rate structure, the use of the insert amounts to an exaction from the utility's customers by way of forced aid for the utility's speech. And, contrary to the Court's suggestion, an allocation of the insert's cost between the utility's shareholders and the ratepayers would not eliminate this coerced subsidy.

I

A public utility is a state-created monopoly. See, *e. g.*, N. Y. Pub. Serv. Law § 68 (McKinney 1955); Jones, Origins of the Certificate of Public Convenience and Necessity; Developments in the States 1870–1920, 79 Colum. L. Rev. 426, 458–461 (1979); Comment, Utility Rates, Consumers, and the New York State Public Service Commission, 39 Albany L. Rev. 707, 709–714 (1975). Although monopolies generally are against the public policies of the United States and of the State of New York, see, *e. g.*, N. Y. Gen. Bus. Law § 340 (McKinney 1968 and Supp. 1979–1980), Consolidated Edison and other utilities are permitted to operate as monopolies because of a determination by the State that the public interest is better served by protecting them from competition. See 2 A. Kahn, The Economics of Regulation 113–171 (1971).

This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching. For this reason, the State regulates the rates that utilities may charge. See N. Y. Pub. Serv. Law § 66 (12) (McKinney Supp. 1979–1980). In addition, New York law gives its Public Service Commission plenary supervisory powers over all property, real and personal, "used or to be used for or in connection with or to facilitate the . . . sale or furnishing of electricity for light, heat or power." N. Y. Pub. Serv. Law §§ 2 (12) and 66 (1) (McKinney 1955). State law explicitly gives the Commission control over the format of the utility bill and any material included in the envelope with the bill. § 66 (12–a) (McKinney Supp. 1979–1980).

The rates authorized by the Public Service Commission may reflect only the costs of providing necessary services to customers plus a reasonable rate of return to the utility's shareholders. See, *e. g.*, Comment, 39 Albany L. Rev., at 719–723. The entire bill payment system—meters, meter-reading, bill mailings, and bill inserts—are paid for by the customers under Commission rules permitting recovery of necessary operating expenses. Uniform System of Accounts—Expense Accounts—Customer Account Expenses, 16 N. Y. C. R. R. §§ 901–906 (1974). Under the laws of New York and other States, however, a public utility cannot include in the rate base the costs of political advertising and lobbying. See, *e. g.*, Uniform System of Accounts, Account 426.4, Expenditures for Certain Civic, Political and Related Activities, 16 N. Y. C. R. R., ch. II, subch. F (1976); *Southern Bell Tel. & Tel. Co.* v. *Louisiana Pub. Serv. Comm'n*, 239 La. 175, 207–209, 118 So. 2d 372, 384 (1960); *Southwestern Bell Tel. Co.*, 19 P. U. R. 4th 1, 28–29 (Kan. Corp. Comm'n 1977); *Boushey* v. *Pacific Gas & Elec. Co.*, 10 P. U. R. 4th 23 (Cal. Pub. Util. Comm'n 1975) (banning controversial bill inserts); *Cascade Natural Gas Corp.*, 8 P. U. R. 4th

19, 27 (Ore. Pub. Util. Comm'n 1974); *Pacific Power & Light Co.*, 34 P. U. R. 3d 36, 46–47 (Ore. Pub. Util. Comm'n 1960); *Southwestern Bell Tel. Co.*, 77 P. U. R. (n. s.) 33, 42 (Mo. Pub. Serv. Comm'n 1949); *In re Investigation into the Advertising and Promotional Practices of Regulated Iowa Pub. Utils.*, No. U–463 (Iowa State Commerce Comm'n Jan. 29, 1975). These costs cannot be passed on to consumers because ratepayers derive no service-related benefits from political advertisements. The purpose of such advertising and lobbying is to benefit the utility's shareholders, and its cost must be deducted from profits otherwise available for the shareholders. The Federal Energy Regulatory Commission, formerly the Federal Power Commission, has adopted this rule as well. *Alabama Power Co.*, 24 F. P. C. 278, 286–287 (1960), aff'd *sub nom. Southwestern Electric Power Co. v. Federal Power Comm'n*, 304 F. 2d 29 (CA5), cert. denied, 371 U. S. 924 (1962); Federal Energy Regulatory Commission, Uniform System of Accounts, Account 426.4, 18 CFR Part 101, p. 383 (1979).

II

The Commission concluded, properly in my view, that use of the billing envelope to distribute management's pamphlets amounts to a forced subsidy of the utility's speech by the ratepayers.[1] Consolidated Edison would counter this argu-

[1] MR. JUSTICE MARSHALL, in his concurring opinion, states: "The Commission did not rely on the argument that the use of bill inserts required ratepayers to subsidize the dissemination of management's view in issuing its order, and we therefore are precluded from sustaining the order on that ground." *Ante*, at 544.

I cannot agree that the Commission did not rely on the "forced subsidy" justification. In its opinion denying petitions for rehearing, the Commission stated:

"We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material

ment by pointing out that it is willing to allocate to shareholders the *additional* costs attributable to the inserts. It maintains: "The fact that the utilities may incidentally save money by the use of bill inserts, at no expense to the ratepayers, is not detrimental to the ratepayers or the public." Brief for Appellant 21.

I do not accept appellant's argument that preventing a "free ride" for the utility's message is not a substantial, legitimate state concern. Even though the free ride may cost the ratepayers nothing additional by way of specific dollars, it still qualifies as forced support of the utility's speech. See, *e. g., Boushey* v. *Pacific Gas & Elec. Co.*, 10 P. U. R. 4th, at 27; Note, Utility Companies and the First Amendment: Regulating the Use of Political Inserts in Utility Bills, 64 Va. L. Rev. 921, 926 (1978). If the State compelled an individual to help defray the utility's speech expenses, that compulsion surely would violate that person's First and Fourteenth Amendment rights. *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 233–235 (1977); *id.*, at 256 (POWELL, J., concurring in judgment). The fact that providing such aid costs the individual nothing extra does not make the compulsion any less offensive. See *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *Buckley* v. *Valeo*, 424 U. S. 1, 22–23, 36 (1976) (recognizing that permitting a candidate to use real or personal property provides material financial assistance to the candidate); *id.*, at 91, n. 124.[2] For example, a state law re-

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in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See *Abood* v. *Detroit Board of Education*, [431 U. S. 209] (1977)." App. to Juris. Statement 67a, n. 1.

[2] *PruneYard Shopping Center* v. *Robins*, *ante*, p. 74, does not impinge upon this general principle. The decision there was based on the fact that the shopping center voluntarily chose to open its grounds to the public and therefore the State could require that the center permit the exercise of speech rights on the property.

quiring a person to permit the utility to include its insert in the envelope with that person's private letters clearly would infringe upon the letterwriter's First and Fourteenth Amendment rights.

Of course, a private business does not deprive an individual of his constitutional rights unless state action is involved. Although the State has given utilities their monopoly power and thus contributed to a situation in which coerced support of the utility's speech is possible, the state-action requirement of the Fourteenth Amendment may not be met in this situation. See *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974).

I do not find it necessary, however, to decide whether state action in the Fourteenth Amendment sense has occurred here. It is not necessary to decide whether the ratepayers' First and Fourteenth Amendment rights have been infringed in order to determine whether the State has the power to prevent the utility from exacting aid from the ratepayers in dissemination of a message with which they do not all agree. Even if the State is not so entwined in the activities of Consolidated Edison to meet the state-action requirement, the State has made a monopoly possible by preventing others from competing with the utility. Thus the State is legitimately concerned with preventing the utility from taking advantage of this monopoly power to force consumers to subsidize dissemination of its viewpoint on political issues.[3]

[3] An example makes this point clear. States authorize the creation of trusts, and the costs of administering a trust are charged to the trust estate. If the trustee, for example a bank, finds it necessary to communicate with the beneficiaries of the trust by letter concerning investments, income distribution, and the like, the expenses of that mailing ordinarily are proper administrative costs to be borne by the trust. In the trust situation, it would seem to be entirely permissible for the State to prohibit the trustee from including in such a mailing its own political insert on a matter unrelated to the trust. Even though adding the bank's insert may cost the beneficiaries nothing, assuming that the bank pays for the printing and stuffing of the insert, the State has an interest in

In suggesting that the State's interest in eliminating forced subsidization of the utility's speech can be achieved by allocating the expenses of the inserts to the utility's shareholders, the Court has glossed over the difficult allocation issue underlying this controversy. It is not clear to me from the Court's opinion whether it believes that charging the shareholders with the marginal costs associated with the inserts, that is, the costs of printing and putting them into the envelope, will satisfy the State's interest, or whether the Court is suggesting some division of the fixed costs of the mailing, that is, the postage, the envelope, the creation and maintenance of the mailing list, and any other overhead expense. See *ante*, at 543.

The Commission maintains that no allocation short of charging all the fixed costs of mailing the bills to the utility's shareholders will eliminate the problem of forced subsidization of the utility's speech. The Commission is obviously correct that the utility will obtain a partial free ride for its message even if the shareholders are charged with part of the mailing costs in addition to the costs directly attributable to the inserts. Consumers would still be forced to aid in the dissemination of the utility's message by making the utility's distribution costs less than they otherwise would be.

Charging all the mailing costs to the shareholders is equivalent, as a practical matter, to the Commission's ban on political inserts. The utility wants to use the inserts only because they are less expensive than a separate mailing.[4] Thus, there

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assuring that the trustee does not derive personal benefit from its role as trustee. The trustee has no constitutional right to a free ride for its message. Here, the state interest in preventing a utility from obtaining a free ride is even stronger, since utility customers have no choice but to purchase electricity from Consolidated Edison, while trusts are voluntarily created and the trustee is chosen by the trustor.

[4] Due to the greater likelihood that a recipient would read an insert with the bill, the utility well might desire to place its insert with the bill even if the total cost of the mailing were charged to the shareholders. See *Long Island Lighting Co.* v. *New York State Public Service Comm'n*,

is no way for the State to achieve its important goal—protecting the ratepayers from forced support of ideas with which they disagree—that is less restrictive than a total ban.

Because ratepayers bear the cost of this medium of communication, the utility's claim to use the bill envelope for its own purposes is not analogous to that of a private letter-writer, or of a nonmonopolistic business, whose customers can turn elsewhere if they object to inserts in their bills that their sales dollars help to finance. Cf. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 794, n. 34 (1978). This, therefore, is not a typical prohibition of a speaker's attempt "merely to utilize its own [property] to promulgate its views." *Ante*, at 540. Rather, this is an attempt by the utility to appropriate and make convenient use of property, for which the public is compelled to pay, for the utility's sole benefit. The Commission's ban on bill inserts does not restrict the utility from using the shareholders' resources to finance communication of its viewpoints on any topic. Consolidated Edison is completely free to use the mails and any other medium of communication on the same basis as any other speaker. The order merely prevents the utility from relying on a forced subsidy from the ratepayers. This leads me to conclude that the State's attempt here to protect the ratepayers from unwillingly financing the utility's speech and to preserve the billing envelope for the sole benefit of the customers who pay for it does not infringe upon the First and Fourteenth Amendment rights of the utility.

III

I might observe, additionally, that I am hopeful that the Court's decision in this case has not completely tied a State's

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No. 77 C 972 (EDNY, Mar. 30, 1979), reproduced in App. to Brief for Long Island Lighting Company as *Amicus Curiae* 1a. This, however, is just another type of forced aid for the utility's message that cannot be eliminated except by a total ban on bill inserts.

hands in preventing this type of abuse of monopoly power. The Court's opinion appears to turn on the particular facts of this case, and slight differences in approach might permit a State to achieve its proper goals.

First, it appears that New York and other States might use their power to define property rights so that the billing envelope is the property of the ratepayers and not of the utility's shareholders. Cf. *PruneYard Shopping Center* v. *Robins, ante,* p. 74. Since it is the ratepayers who pay for the billing packet, I doubt that the Court would find a law establishing their ownership of the packet violative of either the Takings Clause or the First and Fourteenth Amendments. If, under state law, the envelope belongs to the customers, I do not see how restricting the utility from using it could possibly be held to deprive the utility of its rights.

Second, the opinion leaves open the issue of cost allocation. The Commission could charge the utility's shareholders all the costs of the envelopes and postage and of creating and maintaining the mailing list, and charge the consumers only the cost of printing and inserting the bill and the consumer service insert. See *Long Island Lighting Co.* v. *New York State Public Service Comm'n,* No. 77 C 972 (EDNY, Mar. 30, 1979), reproduced in App. to Brief for Long Island Lighting Company as *Amicus Curiae* 22a. There is no reason that the shareholders should be given a free ride for their pamphlets, rather than the customers be given a free ride for their bills. Such an allocation would eliminate the most offensive aspects of the forced subsidization of the utility's speech. But see n. 3, *supra.*

Because I agree with the Appellate Division of the New York Supreme Court, that "[i]n the battle of ideas, the utilities are not entitled to require the consumers to help defray their expenses," 63 App. Div. 2d 364, 368, 407 N. Y. S 2d 735, 737 (1978), I respectfully dissent.

CENTRAL HUDSON GAS & ELECTRIC CORP. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 79–565. Argued March 17, 1980—Decided June 20, 1980

Held: A regulation of appellee New York Public Service Commission which completely bans an electric utility from advertising to promote the use of electricity violates the First and Fourteenth Amendments. Pp. 561–572.

(a) Although the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression, nevertheless the First Amendment protects commercial speech from unwarranted governmental regulation. For commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading. Next, it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial. If both inquiries yield positive answers, it must then be decided whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. Pp. 561–566.

(b) In this case, it is not claimed that the expression at issue is either inaccurate or relates to unlawful activity. Nor is appellant electrical utility's promotional advertising unprotected commercial speech merely because appellant holds a monopoly over the sale of electricity in its service area. Since monopoly over the supply of a product provides no protection from competition with substitutes for that product, advertising by utilities is just as valuable to consumers as advertising by unregulated firms, and there is no indication that appellant's decision to advertise was not based on the belief that consumers were interested in the advertising. Pp. 566–568.

(c) The State's interest in energy conservation is clearly substantial and is directly advanced by appellee's regulations. The State's further interest in preventing inequities in appellant's rates—based on the assertion that successful promotion of consumption in "off-peak" periods would create extra costs that would, because of appellant's rate structure, be borne by all consumers through higher overall rates—is also substantial. The latter interest does not, however, provide a constitutionally adequate reason for restricting protected speech because the link between the advertising prohibition and appellant's rate structure is, at most, tenuous. Pp. 568–569.

(d) Appellee's regulation, which reaches all promotional advertising regardless of the impact of the touted service on overall energy use, is more extensive than necessary to further the State's interest in energy conservation which, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests. Pp. 569–571.

47 N. Y. 2d 94, 390 N. E. 2d 749, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and MARSHALL, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 572. BLACKMUN, J., *post*, p. 573, and STEVENS, J., *post*, p. 579, filed opinions concurring in the judgment, in which BRENNAN, J., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 583.

Telford Taylor argued the cause for appellant. With him on the briefs were *Walter A. Bossert, Jr.*, and *Davison W. Grant.*

Peter H. Schiff argued the cause for appellee. With him on the brief was *Howard J. Read.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

I

In December 1973, the Commission, appellee here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." App. to Juris.

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*Briefs of *amici curiae* urging reversal were filed by *Cameron F. MacRae* and *Robert L. Baum* for the Edison Electric Institute; by *Burt Neuborne* for Long Island Lighting Co.; by *Edward H. Dowd* and *Myrna P. Field* for the Mid-Atlantic Legal Foundation et al.; and by *Edwin P. Rome* and *William H. Roberts* for Mobil Corp.

Statement 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973–1974 winter." *Id.*, at 26a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp., the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Policy Statement divided advertising expenses "into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales." [1] App. to Juris. Statement 35a. The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commission's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in "off-peak" consumption, the ban limits the "beneficial side effects" of such growth in terms of more efficient use of existing powerplants. *Id.*, at 37a. And since oil dealers are not under the Commission's jurisdiction and

[1] The dissenting opinion attempts to construe the Policy Statement to authorize advertising that would result "in a net energy savings" even if the advertising encouraged consumption of additional electricity. *Post*, at 604–605. The attempted construction fails, however, since the Policy Statement is phrased only in terms of advertising that promotes "the purchase of utility services" and "sales" of electricity. Plainly, the Commission did not intend to permit advertising that would enhance net energy efficiency by increasing consumption of electrical services.

thus remain free to advertise, it was recognized that the ban can achieve only "piecemeal conservationism." Still, the Commission adopted the restriction because it was deemed likely to "result in some dampening of unnecessary growth" in energy consumption. *Ibid.*

The Commission's order explicitly permitted "informational" advertising designed to encourage "*shifts* of consumption" from peak demand times to periods of low electricity demand. *Ibid.* (emphasis in orginal). Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria." *Id.*, at 38a.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost,[2] the Commission feared that additional power would be priced below the actual cost of generation. The additional electricity would be subsidized by all consumers through generally higher rates. *Id.*, at 57a–58a. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. *Id.*, at 59a.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments.[3] The Commis-

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[2] "Marginal cost" has been defined as the "*extra* or incremental cost of producing an *extra* unit of output." P. Samuelson, Economics 463 (10th ed. 1976) (emphasis in original).

[3] Central Hudson also alleged that the Commission's order reaches beyond the agency's statutory powers. This argument was rejected by the

sion's order was upheld by the trial court and at the intermediate appellate level.[4] The New York Court of Appeals affirmed. It found little value to advertising in "the noncompetitive market in which electric corporations operate." *Consolidated Edison Co.* v. *Public Service Comm'n*, 47 N. Y. 2d 94, 110, 390 N. E. 2d 749, 757 (1979). Since consumers "have no choice regarding the source of their electric power," the court denied that "promotional advertising of electricity might contribute to society's interest in 'informed and reliable' economic decisionmaking." *Ibid.* The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current energy situation. *Id.*, at 110, 390 N. E. 2d, at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We noted probable jurisdiction, 444 U. S. 962 (1979), and now reverse.

II

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 762 (1976); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 363–364 (1977); *Friedman* v. *Rogers*, 440 U. S. 1, 11 (1979). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *Virginia Pharmacy Board*, 425 U. S., at 761–762. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible

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New York Court of Appeals, *Consolidated Edison Co.* v. *Public Service Comm'n*, 47 N. Y. 2d 94, 102–104, 390 N. E. 2d 749, 752–754 (1979), and was not argued to this Court.

[4] *Consolidated Edison Co.* v. *Public Service Comm'n*, 63 App. Div. 2d 364, 407 N. Y. S. 2d 735 (1978); App. to Juris. Statement 22a (N. Y. Sup. Ct., Feb. 17, 1978).

dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." *Id.*, at 770; see *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. *Bates* v. *State Bar of Arizona*, *supra*, at 374.

Nevertheless, our decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978); see *Bates* v. *State Bar of Arizona*, *supra*, at 381; see also Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 38–39 (1979).[5] The

[5] In an opinion concurring in the judgment, MR. JUSTICE STEVENS suggests that the Commission's order reaches beyond commercial speech to suppress expression that is entitled to the full protection of the First Amendment. See *post*, at 580–581. We find no support for this claim in the record of this case. The Commission's Policy Statement excluded "institutional and informational" messages from the advertising ban, which was restricted to all advertising "clearly intended to promote sales." App. to Juris. Statement 35a. The complaint alleged only that the "prohibition of promotional advertising by Petitioner is not reasonable regulation of Petitioner's commercial speech. . . ." *Id.*, at 70a. Moreover, the state-court opinions and the arguments of the parties before this Court also viewed this litigation as involving only commercial speech. Nevertheless, the concurring opinion of MR. JUSTICE STEVENS views the Commission's order as suppressing more than commercial speech because it would outlaw, for example, advertising that promoted electricity consumption by touting the environmental benefits of such uses. See *post*, at 581. Ap-

Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. 436 U. S., at 456, 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 783 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, *Friedman* v. *Rogers*, *supra*, at 13, 15–16; *Ohralik* v. *Ohio State Bar Assn.*, *supra*, at 464–465, or

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parently the opinion would accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions frequently discussed and debated by our political leaders." *Ibid.*

Although this approach responds to the serious issues surrounding our national energy policy as raised in this case, we think it would blur further the line the Court has sought to draw in commercial speech cases. It would grant broad constitutional protection to any advertising that links a product to a current public debate. But many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety. We rule today in *Consolidated Edison Co.* v. *Public Service Comm'n*, *ante*, p. 530, that utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions. In that context, for example, the State retains the power to "insur[e] that the stream of commercial information flow[s] cleanly as well as freely." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 772 (1975). This Court's decisions on commercial expression have rested on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech. As we stated in *Ohralik*, the failure to distinguish between commercial and noncommercial speech "could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." 436 U. S., at 456.

commercial speech related to illegal activity, *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 388 (1973).[6]

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both *Bates* and *Virginia Pharmacy Board*, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in *Virginia Pharmacy Board* that "[t]he advertising ban does not directly affect professional standards one way or the other." 425 U. S., at 769. In *Bates*, the Court overturned an advertising prohibition that was designed to protect the "quality" of a lawyer's work.

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[6] In most other contexts, the First Amendment prohibits regulation based on the content of the message. *Consolidated Edison Co.* v. *Public Service Comm'n*, *ante*, at 537–540. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

"Restraints on advertising . . . are an ineffective way of deterring shoddy work." 433 U. S., at 378.[7]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[8] The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, see *First National Bank of Boston* v. *Bellotti*, *supra*, at 794–795, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well. For example, in *Bates* the Court explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials. 433 U. S., at 384. See *Virginia Pharmacy Board*, *supra*, at 773. And in *Carey* v. *Population Services International*, 431 U. S. 678, 701–702 (1977), we held that the State's "arguments . . . do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that

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[7] In *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 95–96 (1977), we observed that there was no definite connection between the township's goal of integrated housing and its ban on the use of "For Sale" signs in front of houses.

[8] This analysis is not an application of the "overbreadth" doctrine. The latter theory permits the invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity. *E. g.*, *Kunz* v. *New York*, 340 U. S. 290 (1951). The overbreadth doctrine derives from the recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853–858 (1970). This restraint is less likely where the expression is linked to "commercial well-being" and therefore is not easily deterred by "overbroad regulation." *Bates* v. *State Bar of Arizona*, *supra*, at 381.

In this case, the Commission's prohibition acts directly against the promotional activities of Central Hudson, and to the extent the limitations are unnecessary to serve the State's interest, they are invalid.

the State could implement more carefully drawn restrictions. See *id.*, at 712 (POWELL, J., concurring in part and in judgment); *id.*, at 716–717 (STEVENS, J., concurring in part and in judgment).[9]

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

III

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market"

[9] We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See *Virginia Pharmacy Board*, 425 U. S., at 780, n. 8 (STEWART, J., concurring). Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.

could not improve the decisionmaking of consumers. 47 N. Y. 2d, at 110, 390 N. E. 2d, at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

This reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ago, see *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U. S. 63, 72 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.[10]

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesses—even regulated monopolies—are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly service at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we

[10] Several commercial speech decisions have involved enterprises subject to extensive state regulation. *E. g.*, *Friedman* v. *Rogers*, 440 U. S. 1, 4–5 (1979) (optometrists); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyers); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*, at 750–752 (pharmacists).

may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.[11] Since no such extraordinary conditions have been identified in this case, appellant's monopoly position does not alter the First Amendment's protection for its commercial speech.

B

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utilities' rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would

[11] There may be a greater incentive for a utility to advertise if it can use promotional expenses in determining its rate of return, rather than pass those costs on solely to shareholders. That practice, however, hardly distorts the economic decision whether to advertise. Unregulated businesses pass on promotional costs to consumers, and this Court expressly approved the practice for utilities in *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U. S. 63, 72 (1935).

be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult and important questions of economic supply and distributional fairness.[12] The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

C

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than

[12] See W. Jones, Regulated Industries 191–287 (2d ed. 1976).

necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Appellant insists that but for the ban, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "backup" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying rehearing made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978).

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To fur-

ther its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. Cf. *Banzhaf* v. *FCC*, 132 U. S. App. D. C. 14, 405 F. 2d 1082 (1968), cert. denied *sub nom. Tobacco Institute, Inc.* v. *FCC*, 396 U. S. 842 (1969).[13] In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.[14]

IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternative energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When, however, such action in-

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[13] The Commission also might consider a system of previewing advertising campaigns to insure that they will not defeat conservation policy. It has instituted such a program for approving "informational" advertising under the Policy Statement challenged in this case. See *supra*, at 560. We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S., at 771–772, n. 24. And in other areas of speech regulation, such as obscenity, we have recognized that a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

[14] In view of our conclusion that the Commission's advertising policy violates the First and Fourteenth Amendments, we do not reach appellant's claims that the agency's order also violated the Equal Protection Clause of the Fourteenth Amendment, and that it is both overbroad and vague.

volves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement.[15]

Accordingly, the judgment of the New York Court of Appeals is

Reversed.

MR. JUSTICE BRENNAN, concurring in the judgment.

One of the major difficulties in this case is the proper characterization of the Commission's Policy Statement. I find it impossible to determine on the present record whether the Commission's ban on all "promotional" advertising, in contrast to "institutional and informational" advertising, see *ante*, at 559, is intended to encompass more than "commercial speech." I am inclined to think that MR. JUSTICE STEVENS is correct that the Commission's order prohibits more than mere proposals to engage in certain kinds of commercial transactions, and therefore I agree with his conclusion that the ban surely violates the First and Fourteenth Amendments. But even on the assumption that the Court is correct that the Commission's order reaches only commercial speech, I agree with MR. JUSTICE BLACKMUN that "[n]o differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information." *Post*, at 578.

Accordingly, with the qualifications implicit in the pre-

[15] The Commission order at issue here was not promulgated in response to an emergency situation. Although the advertising ban initially was prompted by critical fuel shortage in 1973, the Commission makes no claim that an emergency now exists. We do not consider the powers that the State might have over utility advertising in emergency circumstances. See *State v. Oklahoma Gas & Electric Co.*, 536 P. 2d 887, 895–896 (Okla. 1975).

ceding paragraph, I join the opinions of MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS concurring in the judgment.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

I agree with the Court that the Public Service Commission's ban on promotional advertising of electricity by public utilities is inconsistent with the First and Fourteenth Amendments. I concur only in the Court's judgment, however, because I believe the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech.

The Court asserts, *ante*, at 566, that "a four-part analysis has developed" from our decisions concerning commercial speech. Under this four-part test a restraint on commercial "communication [that] is neither misleading nor related to unlawful activity" is subject to an intermediate level of scrutiny, and suppression is permitted whenever it "directly advances" a "substantial" governmental interest and is "not more extensive than is necessary to serve that interest." *Ante*, at 564 and 566. I agree with the Court that this level of intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech. I do not agree, however, that the Court's four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.

Since the Court, without citing empirical data or other authority, finds a "direct link" between advertising and energy consumption, it leaves open the possibility that the State may suppress advertising of electricity in order to lessen demand for electricity. I, of course, agree with the Court that,

in today's world, energy conservation is a goal of paramount national and local importance. I disagree with the Court, however, when it says that suppression of speech may be a permissible means to achieve that goal. MR. JUSTICE STEVENS appropriately notes: "The justification for the regulation is nothing more than the expressed fear that the audience may find the utility's message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communication may persuade some citizens to consume more electricity than they otherwise would." *Post*, at 581.

The Court recognizes that we have never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised. *Ante*, at 566, n. 9. Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques.[1] Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated.[2]

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt

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[1] See *Friedman* v. *Rogers*, 440 U. S. 1, 10 (1979) (Court upheld a ban on practice of optometry under a trade name as a permissible requirement that commercial information "'appear in such a form . . . as [is] necessary to prevent its being deceptive,'" quoting from *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 772, n. 24 (1976)); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978).

[2] See *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977); *Carey* v. *Population Services International*, 431 U. S. 678, 700–702 (1977); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977); *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976); *Bigelow* v. *Virginia*, 421 U. S. 809 (1975).

by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. As the Court recognizes, the State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them. *Ante*, at 566, n. 9 ("We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy"). See Rotunda, The Commercial Speech Doctrine in the Supreme Court, 1976 U. Ill. Law Forum 1080, 1080–1083.

If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public. See generally Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205, 243–251 (1976). Our cases indicate that this guarantee applies even to commercial speech. In *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976), we held that Virginia could not pursue its goal of encouraging the public to patronize the "professional pharmacist" (one who provided individual attention and a stable pharmacist-customer relationship) by "keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.*, at 770. We noted that our decision left the State free to pursue its goal of maintaining high standards among its pharmacists by "requir[ing] whatever professional standards it wishes of its pharmacists." *Ibid.*

We went on in *Virginia Pharmacy Board* to discuss the types of regulation of commercial speech that, due to the "commonsense differences" between this form of speech and other forms, are or may be constitutionally permissible. We indicated that government may impose reasonable "time,

place, and manner" restrictions, and that it can deal with false, deceptive, and misleading commercial speech. We noted that the question of advertising of illegal transactions and the special problems of the electronic broadcast media were not presented.

Concluding with a restatement of the type of restraint that is not permitted, we said: "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. . . . [W]e conclude that the answer to this [question] is in the negative." *Id.*, at 773.

Virginia Pharmacy Board did not analyze the State's interests to determine whether they were "substantial." Obviously, preventing professional dereliction and low quality health care are "substantial," legitimate, and important state goals. Nor did the opinion analyze the ban on speech to determine whether it "directly advance[d]," *ante*, at 566, 569, these goals. We also did not inquire whether a "more limited regulation of . . . commercial expression," *ante*, at 570, would adequately serve the State's interests. Rather, we held that the State "may *not* [pursue its goals] by keeping the public in ignorance." 425 U. S., at 770. (Emphasis supplied.)

Until today, this principle has governed. In *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977), we considered whether a town could ban "For Sale" signs on residential property to further its goal of promoting stable, racially integrated housing. We did note that the record did not establish that the ordinance was necessary to enable the State to achieve its goal. The holding of *Linmark*, however, was much broader.[3] We stated:

"The constitutional defect in this ordinance, however,

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[3] In my view, the Court today misconstrues the holdings of both *Virginia Pharmacy Board* and *Linmark Associates* by implying that those decisions were based on the fact that the restraints were not closely enough

> is far more basic. The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.*, acted to prevent its residents from obtaining certain information . . . which pertains to sales activity in Willingboro. . . . The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens." *Id.*, at 96.

The Court in *Linmark* resolved beyond all doubt that a strict standard of review applies to suppression of commercial information, where the purpose of the restaint is to influence behavior by depriving citizens of information. The Court followed the strong statement above with an explicit adoption of the standard advocated by Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 377 (1927): "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." 431 U. S., at 97.

Carey v. *Population Services International*, 431 U. S. 678, 700–702 (1977), also applied to content-based restraints on commercial speech the same standard of review we have applied to other varieties of speech. There the Court held that a ban on advertising of contraceptives could not be justified

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related to the governmental interests asserted. See *ante*, at 564–565, and n. 7. Although the Court noted the lack of substantial relationship between the restraint and the governmental interest in each of those cases, the holding of each clearly rested on a much broader principle.

by the State's interest in avoiding " 'legitimation' of illicit sexual behavior" because the advertisements could not be characterized as " 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,' " *id.*, at 701, quoting *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969).

Our prior references to the " 'commonsense differences' " between commercial speech and other speech " 'suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.' " *Linmark Associates*, 431 U. S., at 98, quoting *Virginia Pharmacy Board*, 425 U. S., at 771–772, n. 24. We have not suggested that the "commonsense differences" between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech. The differences articulated by the Court, see *ante*, at 564, n. 6, justify a more permissive approach to regulation of the manner of commercial speech for the purpose of protecting consumers from deception or coercion, and these differences explain why doctrines designed to prevent "chilling" of protected speech are inapplicable to commercial speech. No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information. The Court stated in *Carey* v. *Population Services International:*

> "Appellants suggest no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression—*the core of First Amendment values.*" 431 U. S., at 701, n. 28 (emphasis added).

It appears that the Court would permit the State to ban all direct advertising of air conditioning, assuming that a more limited restriction on such advertising would not effectively deter the public from cooling its homes. In my view, our cases do not support this type of suppression. If a governmental unit believes that use or overuse of air conditioning is a serious problem, it must attack that problem directly, by prohibiting air conditioning or regulating thermostat levels. Just as the Commonwealth of Virginia may promote professionalism of pharmacists directly, so too New York may *not* promote energy conservation "by keeping the public in ignorance." *Virginia Pharmacy Board*, 425 U. S., at 770.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

Because "commercial speech" is afforded less constitutional protection than other forms of speech,[1] it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed. The issue in this case is whether New York's prohibition on the promotion of the use of electricity through advertising is a ban on nothing but commercial speech.

In my judgment one of the two definitions the Court uses in addressing that issue is too broad and the other may be somewhat too narrow. The Court first describes commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Ante*, at 561. Although it is not entirely clear whether this definition uses the subject matter of the speech or the motivation of the speaker as the limiting factor, it seems clear to me that it encompasses speech that is entitled to the maximum protection afforded by the First Amendment. Neither a labor leader's exhortation to

[1] See *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456, quoted *ante*, at 563, n. 5. Cf. *Smith* v. *United States*, 431 U. S. 291, 318 (STEVENS, J., dissenting).

strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward. Thus, the Court's first definition of commercial speech is unquestionably too broad.[2]

The Court's second definition refers to " 'speech proposing a commercial transaction.' " *Ante*, at 562. A saleman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept.[3] Presumably, the definition is intended to encompass advertising that advises possible buyers of the availability of specific products at specific prices and describes the advantages of purchasing such items. Perhaps it also extends to other communications that do little more than make the name of a product or a service more familiar to the general public. Whatever the precise contours of the concept, and perhaps it is too early to enunciate an exact formulation, I am persuaded that it should not include the entire range of communication that is embraced within the term "promotional advertising."

This case involves a governmental regulation that completely bans promotional advertising by an electric utility. This ban encompasses a great deal more than mere proposals to engage in certain kinds of commercial transactions. It prohibits all advocacy of the immediate or future use of elec-

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[2] See Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372, 382–383 (1979):

"Economic motivation could not be made a disqualifying factor [from maximum protection] without enormous damage to the first amendment. Little purpose would be served by a first amendment which failed to protect newspapers, paid public speakers, political candidates with partially economic motives and professional authors." (Footnotes omitted.)

[3] See *id.*, at 386–387.

tricity. It curtails expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy—questions frequently discussed and debated by our political leaders. For example, an electric company's advocacy of the use of electric heat for environmental reasons, as opposed to wood-burning stoves, would seem to fall squarely within New York's promotional advertising ban and also within the bounds of maximum First Amendment protection. The breadth of the ban thus exceeds the boundaries of the commercial speech concept, however that concept may be defined.[4]

The justification for the regulation is nothing more than the expressed fear that the audience may find the utility's message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communication may persuade some citizens to consume more electricity than they otherwise would. I assume that such a consequence would be undesirable and that government may therefore prohibit and punish the unnecessary or excessive use of electricity. But if the perceived harm associated with greater electrical usage is not sufficiently serious to justify direct regulation, surely it does not constitute the kind of clear and present danger that can justify the suppression of speech.

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[4] The utility's characterization of the Commission's ban in its complaint as involving commercial speech clearly does not bind this Court's consideration of the First Amendment issues in this new and evolving area of constitutional law.

Nor does the Commission's intention not to suppress "institutional and informational" speech insure that only "commercial speech" will be suppressed. The blurry line between the two categories of speech has the practical effect of requiring that the utilities either refrain from speech that is close to the line, or seek advice from the Public Service Commission. But the Commission does not possess the necessary expertise in dealing with these sensitive free speech questions; and, in any event, ordinarily speech entitled to maximum First Amendment protection may not be subjected to a prior clearance procedure with a government agency.

Although they were written in a different context, the words used by Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 376–377, explain my reaction to the prohibition against advocacy involved in this case:

> "But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.
>
> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution." (Footnote omitted.) [5]

[5] Mr. Justice Brandeis quoted Lord Justice Scrutton's comment in *King* v. *Secretary of State for Home Affairs ex parte O'Brien*, [1923] 2 K. B. 361, 382: " 'You really believe in freedom of speech, if you are willing to

In sum, I concur in the result because I do not consider this to be a "commercial speech" case. Accordingly, I see no need to decide whether the Court's four-part analysis, *ante*, at 566, adequately protects commercial speech—as properly defined—in the face of a blanket ban of the sort involved in this case.

MR. JUSTICE REHNQUIST, dissenting.

The Court today invalidates an order issued by the New York Public Service Commission designed to promote a policy that has been declared to be of critical national concern. The order was issued by the Commission in 1973 in response to the Mideastern oil embargo crisis. It prohibits electric corporations "from *promoting* the use of electricity through the use of advertising, subsidy payments . . . , or employee incentives." State of New York Public Service Commission, Case No. 26532 (Dec. 5, 1973), App. to Juris. Statement 31a (emphasis added). Although the immediate crisis created by the oil embargo has subsided, the ban on promotional advertising remains in effect. The regulation was re-examined by the New York Public Service Commission in 1977. Its constitutionality was subsequently upheld by the New York Court of Appeals, which concluded that the paramount national interest in energy conservation justified its retention.[1]

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allow it to men whose opinions seem to you wrong and even dangerous. . . .'" 274 U. S., at 377, n. 4.

See also *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63 (opinion of STEVENS, J.).

[1] The New York Court of Appeals stated:

"In light of current exigencies, one of the policies of any public service legislation must be the conservation of our vital and irreplaceable resources. The Legislature has but recently imposed upon the commission a duty 'to encourage all persons and corporations . . . to formulate and carry out long-range programs . . . [for] the preservation of environmental values and the conservation of natural resources' (Public Service Law, § 5, subd. 2). Implicit in this amendment is a legislative recognition of the serious situation which confronts our State and Nation. More important, conservation of resources has become an avowed legislative

The Court's asserted justification for invalidating the New York law is the public interest discerned by the Court to underlie the First Amendment in the free flow of commercial information. Prior to this Court's recent decision in *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), however, commercial speech was afforded no protection under the First Amendment whatsoever. See, *e. g.*, *Breard* v. *Alexandria*, 341 U. S. 622 (1951); *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942). Given what seems to me full recognition of the holding of *Virginia Pharmacy Board* that commercial speech is entitled to some degree of First Amendment protection, I think the Court is nonetheless incorrect in invalidating the carefully considered state ban on promotional advertising in light of pressing national and state energy needs.

The Court's analysis in my view is wrong in several respects. Initially, I disagree with the Court's conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation and that the speech involved (if it falls within the scope of the First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today. Finally, the Court in reaching its decision improperly substitutes its own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted. With regard to this latter point, the Court adopts as its final part of a four-part test a "no more

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policy embodied in the commission's enabling act (see also, *Matter of New York State Council of Retail Merchants* v. *Public Serv. Comm. of State of N. Y.*, 45 N. Y. 2d 661, 673–674)." *Consolidated Edison Co.* v. *Public Service Comm'n*, 47 N. Y. 2d 94, 102–103, 390 N. E. 2d 749, 753 (1979).

extensive than necessary" analysis that will unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State.

I

In concluding that appellant's promotional advertising constitutes protected speech, the Court reasons that speech by electric utilities is valuable to consumers who must decide whether to use the monopoly service or turn to an alternative energy source, and if they decide to use the service how much of it to purchase. *Ante*, at 567. The Court in so doing "assume[s] that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." *Ante*, at 568. The Court's analysis ignores the fact that the monopoly here is entirely state-created and subject to an extensive state regulatory scheme from which it derives benefits as well as burdens.

While this Court has stated that the "capacity [of speech] for informing the public does not depend upon the identity of its source," *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978), the source of the speech nevertheless may be relevant in determining whether a given message is protected under the First Amendment.[2] When the source of the speech is a state-created monopoly such as this, traditional First Amendment concerns, if they come into play at all, certainly do not justify the broad interventionist role adopted by the Court today. In *Consolidated Edison Co.* v.

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[2] In *Brown* v. *Glines*, 444 U. S. 348 (1980), for example, we recently upheld Air Force regulations that imposed restrictions on the free speech and petition rights of Air Force personnel. See also, *e. g.*, *Parker* v. *Levy*, 417 U. S. 733 (1974) (commissioned officer may be prohibited from publicly urging enlisted personnel to disobey orders that might send them into combat); *Snepp* v. *United States*, 444 U. S. 507 (1980) (employees of intelligence agency may be required to submit publications relating to agency activity for prepublication review by the agency).

Public Service Comm'n, ante, at 549–550, MR. JUSTICE BLACKMUN observed:

> "A public utility is a state-created monopoly. See, *e. g.*, N. Y. Pub. Serv. Law § 68 (McKinney 1955); Jones, Origins of the Certificate of Public Convenience and Necessity; Developments in the States 1870–1920, 79 Colum. L. Rev. 426, 458–461 (1979); Comment, Utility Rates, Consumers, and the New York State Public Service Commission, 39 Albany L. Rev. 707, 709–714 (1975). Although monopolies generally are against the public policies of the United States and of the State of New York, see, *e. g.*, N. Y. Gen. Bus. Law § 340 (McKinney 1968 and Supp. 1979–1980), . . . utilities are permitted to operate as monopolies because of a determination by the State that the public interest is better served by protecting them from competition. See 2 A. Kahn, The Economics of Regulation 113–171 (1971).
>
> "This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching. . . . New York law gives its Public Service Commission plenary supervisory powers over all property, real and personal, 'used or to be used for or in connection with or to facilitate the . . . sale or furnishing of electricity for light, heat or power.' N. Y. Pub. Serv. Law §§ 2 (12) and 66 (1) (McKinney 1955)."

Thus, although *First National Bank of Boston* v. *Bellotti, supra,* holds that speech of a corporation is entitled to some First Amendment protection, it by no means follows that a utility with monopoly power conferred by a State is also entitled to such protection.

The state-created monopoly status of a utility arises from the unique characteristics of the services that a utility provides. As recognized in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 595–596 (1976), "public utility regulation typically

assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." The consequences of this natural monopoly in my view justify much more wide-ranging supervision and control of a utility under the First Amendment than this Court held in *Bellotti* to be permissible with regard to ordinary corporations. Corporate status is generally conferred as a result of a State's determination that the corporate characteristics "enhance its efficiency as an economic entity." *First National Bank of Boston* v. *Bellotti, supra,* at 825–826 (REHNQUIST, J., dissenting). A utility, by contrast, fulfills a function that serves special public interests as a result of the natural monopoly of the service provided. Indeed, the extensive regulations governing decisionmaking by public utilities suggest that for purposes of First Amendment analysis, a utility is far closer to a state-controlled enterprise than is an ordinary corporation.[3] Accordingly, I think a State has broad discretion in determining the statements that a utility may make in that such statements emanate from the entity created by the State to provide important and unique public services. And a state regulatory body charged with the oversight of these types of services may reasonably decide to impose on the utility a special duty to conform its conduct to

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[3] In this regard the New York Court of Appeals stated:

"Public utilities, from the earliest days in this State, have been regulated and franchised to serve the commonweal. Our policy is 'to withdraw the unrestricted right of competition between corporations occupying . . . the public streets . . . and supplying the public with their products or utilities which are well nigh necessities' (*People ex rel. New York Edison Co.* v. *Willcox,* 207 N. Y. 86, 99; *Matter of New York Elec. Lines Co.,* 201 N. Y. 321). The realities of the situation all but dictate that a utility be granted monopoly status (see *People ex rel. New York Elec. Lines Co.* v. *Squire,* 107 N. Y. 593, 603–605). To protect against abuse of this superior economic position extensive governmental regulation has been deemed a necessary coordinate (see *People ex rel. New York Edison Co.* v. *Willcox, supra,* at pp. 93–94)." 47 N. Y. 2d, at 109–110, 390 N. E. 2d, at 757.

the agency's conception of the public interest. Thus I think it is constitutionally permissible for it to decide that promotional advertising is inconsistent with the public interest in energy conservation. I also think New York's ban on such advertising falls within the scope of permissible state regulation of an economic activity by an entity that could not exist in corporate form, say nothing of enjoy monopoly status, were it not for the laws of New York.[4]

II

This Court has previously recognized that although commercial speech may be entitled to First Amendment protection, that protection is not as extensive as that accorded to the advocacy of ideas. Thus, we stated in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978):

> "Expression concerning purely commercial transactions has come within the ambit of the Amendment's protec-

[4] The Commission's restrictions on promotional advertising are grounded in its concern that electric utilities fulfill their obligation under the New York Public Service Law to provide "adequate" service at "just and reasonable" rates. N. Y. Pub. Serv. Law § 65 (1) (McKinney 1955). The Commission, under state law, is required to set reasonable rates. N. Y. Pub. Serv. Law §§ 66 (2) and 72 (McKinney 1955); § 66 (12) (McKinney Supp. 1979). The Commission has also been authorized by the legislature to prescribe "such reasonable improvements [in electric utilities' practices] as will best promote the public interest. . . ." § 66 (2). And in the performance of its duties the Commission is required to "encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values, and the conservation of natural resources." N. Y. Pub. Serv. Law § 5 (2) (McKinney Supp. 1979). Here I think it was quite reasonable for the State Public Service Commission to conclude that the ban on promotional advertising was necessary to prevent utilities from using their broad state-conferred monopoly power to promote their own economic well-being at the expense of the state interest in energy conservation—an interest that could reasonably be found to be inconsistent with the promotion of greater profits for utilities.

> tion only recently. In rejecting the notion that such speech 'is wholly outside the protection of the First Amendment,' *Virginia Pharmacy, supra,* at 761, we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. 425 U. S., at 771, n. 24. We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." (Footnote omitted.)

The Court's decision today fails to give due deference to this subordinate position of commercial speech. The Court in so doing returns to the bygone era of *Lochner* v. *New York,* 198 U. S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.

I had thought by now it had become well established that a State has broad discretion in imposing economic regulations. As this Court stated in *Nebbia* v. *New York,* 291 U. S. 502, 537 (1934):

> "[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects. . . .

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. . . . [I]t does not lie with the courts to determine that the rule is unwise."

And Mr. Justice Black, writing for the Court, observed more recently in *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963):

> "The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

The State of New York has determined here that economic realities require the grant of monopoly status to public utilities in order to distribute efficiently the services they provide, and in granting utilities such status it has made them subject to an extensive regulatory scheme. When the State adopted this scheme and when its Public Service Commission issued its initial ban on promotional advertising in 1973, commercial speech had not been held to fall within the scope of the First Amendment at all. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), however, subsequently accorded commercial speech a limited measure of First Amendment protection.

The Court today holds not only that commercial speech is entitled to First Amendment protection, but also that when it is protected a State may not regulate it unless its reason for doing so amounts to a "substantial" governmental interest, its regulation "directly advances" that interest, and its manner of regulation is "not more extensive than necessary" to serve the interest. *Ante*, at 566. The test adopted by the Court thus elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech. I think the Court in so doing has effectively accomplished the "devitalization" of the First Amendment that it counseled against in *Ohralik*. I think it has also, by labeling economic regulation of business conduct as a restraint on "free speech," gone far to resurrect the discredited doctrine of cases such as *Lochner* and *Tyson & Brother* v. *Banton*, 273 U. S. 418 (1927). New York's order here is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court.

I doubt there would be any question as to the constitutionality of New York's conservation effort if the Public Service Commission had chosen to raise the price of electricity, see, *e. g.*, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940); *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936), to condition its sale on specified terms, see, *e. g.*, *Nebbia* v. *New York*, *supra*, at 527–528, or to restrict its production, see, *e. g.*, *Wickard* v. *Filburn*, 317 U. S. 111 (1942). In terms of constitutional values, I think that such controls are virtually indistinguishable from the State's ban on promotional advertising.

An ostensible justification for striking down New York's ban on promotional advertising is that this Court has previously "rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if

only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .'" *Ante*, at 562. Whatever the merits of this view, I think the Court has carried its logic too far here.

The view apparently derives from the Court's frequent reference to the "marketplace of ideas," which was deemed analogous to the commercial market in which a laissez-faire policy would lead to optimum economic decisionmaking under the guidance of the "invisible hand." See, *e. g.*, Adam Smith, Wealth of Nations (1776). This notion was expressed by Mr. Justice Holmes in his dissenting opinion in *Abrams* v. *United States*, 250 U. S. 616, 630 (1919), wherein he stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." See also, *e. g.*, *Consolidated Edison* v. *Public Service Comm'n*, *ante*, at 534; J. Mill, On Liberty (1858); J. Milton, Areopagitica, A Speech for the Liberty of Unlicensed Printing (1644).

While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market. See, *e. g.*, Baker, Scope of the First Amendment, Freedom of Speech, 25 UCLA L. Rev. 964, 967–981 (1978). Indeed, many types of speech have been held to fall outside the scope of the First Amendment, thereby subject to governmental regulation, despite this Court's references to a marketplace of ideas. See, *e. g.*, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942) (fighting words); *Beauharnais* v. *Illinois*. 343 U. S. 250 (1952) (group libel); *Roth* v. *United States*, 354 U. S. 476 (1957) (obscenity). It also has been held that the government has

a greater interest in regulating some types of protected speech than others. See, *e. g.*, *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978) (indecent speech); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra* (commercial speech). And as this Court stated in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 344, n. 9 (1974): "Of course, an opportunity for rebuttal seldom suffices to undo [the] harm of a defamatory falsehood. Indeed the law of defamation is rooted in our experience that the truth rarely catches up with a lie." The Court similarly has recognized that false and misleading commercial speech is not entitled to any First Amendment protection. See, *e. g.*, *ante*, at 566.

The above examples illustrate that in a number of instances government may constitutionally decide that societal interests justify the imposition of restrictions on the free flow of information. When the question is whether a given commercial message is protected, I do not think this Court's determination that the information will "assist" consumers justifies judicial invalidation of a reasonably drafted state restriction on such speech when the restriction is designed to promote a concededly substantial state interest. I consequently disagree with the Court's conclusion that the societal interest in the dissemination of commercial information is sufficient to justify a restriction on the State's authority to regulate promotional advertising by utilities; indeed, in the case of a regulated monopoly, it is difficult for me to distinguish "society" from the state legislature and the Public Service Commission. Nor do I think there is any basis for concluding that individual citizens of the State will recognize the need for and act to promote energy conservation to the extent the government deems appropriate, if only the channels of communication are left open.[5] Thus, even if I were

[5] Although the Constitution attaches great importance to freedom of speech under the First Amendment so that individuals will be better informed and their thoughts and ideas will be uninhibited, it does not follow that "people will perceive their own best interests," or that if they do

to agree that commercial speech is entitled to some First Amendment protection, I would hold here that the State's decision to ban promotional advertising, in light of the substantial state interest at stake, is a constitutionally permissible exercise of its power to adopt regulations designed to promote the interests of its citizens.

The plethora of opinions filed in this case highlights the doctrinal difficulties that emerge from this Court's decisions granting First Amendment protection to commercial speech. My Brother STEVENS, quoting Mr. Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357, 376–377 (1927), includes Mr. Justice Brandeis' statement that "[t]hose who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." *Ante*, at 582. MR. JUSTICE BLACKMUN, in his separate opinion, joins only in the Court's judgment because he believes that the Court's opinion "does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech." *Ante*, at 573. Both MR. JUSTICE STEVENS, *ante*, at 582, and MR. JUSTICE BLACKMUN, *ante*, at 577, would apply the following formulation by Mr. Justice Brandeis of the clear-and-present-danger test to the regulation of speech at issue in this case:

"If there be time to expose through discussion the false-

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they will act to promote them. With respect to governmental policies that do not offer immediate tangible benefits and the success of which depends on incremental contributions by all members of society, such as would seem to be the case with energy conservation, a strong argument can be made that while a policy may be in the longrun interest of all members of society, some rational individuals will perceive it to their own shortrun advantage to not act in accordance with that policy. When the regulation of commercial speech is at issue, I think this is a consideration that the government may properly take into account. As was observed in *Townsend* v. *Yeomans*, 301 U. S. 441, 451 (1937), "the legislature, acting within its sphere, is presumed to know the needs of the people of the State." This observation in my view is applicable to the determination of the State Public Service Commission here.

> hood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney* v. *California, supra,* at 377 (concurring opinion).

Although the Court today does not go so far as to adopt this position, its reasons for invalidating New York's ban on promotional advertising make it quite difficult for a legislature to draft a statute regulating promotional advertising that will satisfy the First Amendment requirements established by the Court in this context. See Part III, *infra.*

Two ideas are here at war with one another, and their resolution, although it be on a judicial battlefield, will be a very difficult one. The sort of "advocacy" of which Mr. Justice Brandeis spoke was not the advocacy on the part of a utility to use more of its product. Nor do I think those who won our independence, while declining to "exalt order at the cost of liberty," would have viewed a merchant's unfettered freedom to advertise in hawking his wares as a "liberty" not subject to extensive regulation in light of the government's substantial interest in attaining "order" in the economic sphere.

While I agree that when the government attempts to regulate speech of those expressing views on public issues, the speech is protected by the First Amendment unless it presents "a clear and present danger" of a substantive evil that the government has a right to prohibit, see, *e. g., Schenck* v. *United States,* 249 U. S. 47, 52 (1919), I think it is important to recognize that this test is appropriate in the political context in light of the central importance of such speech to our system of self-government. As observed in *Buckley* v. *Valeo,* 424 U. S. 1, 14 (1976):

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to

> such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "

And in *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964), this Court stated that "speech concerning public affairs is more than self-expression; it is the essence of self-government."

The First Amendment, however, does not always require a clear and present danger to be present before the government may regulate speech. Although First Amendment protection is not limited to the "exposition of ideas" on public issues, see, *e. g.*, *Winters* v. *New York*, 333 U. S. 507, 510 (1948)—both because the line between the informing and the entertaining is elusive and because art, literature, and the like may contribute to important First Amendment interests of the individual in freedom of speech—it is well established that the government may regulate obscenity even though its does not present a clear and present danger. Compare, *e. g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 57–58 (1973), with *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969). Indecent speech, at least when broadcast over the airwaves, also may be regulated absent a clear and present danger of the type described by Mr. Justice Brandeis and required by this Court in *Brandenburg*. *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). And in a slightly different context this Court declined to apply the clear-and-present-danger test to a conspiracy among members of the press in violation of the Sherman Act because to do so would "degrade" that doctrine. *Associated Press* v. *United States*, 326 U. S. 1, 7 (1945). Nor does the Court today apply the clear-and-present-danger test in invalidating New York's ban on promotional advertising. As noted above, in these and other contexts the Court has clearly rejected the notion that there must be a free "marketplace of ideas."

If the complaint of those who feel the Court's opinion does not go far enough is that the "only test of truth is its ability

to get itself accepted in the marketplace of ideas"—the test advocated by Thomas Jefferson in his first inaugural address, and by Mr. Justice Holmes in *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dissenting opinion)—there is no reason whatsoever to limit the protection accorded commercial speech to "truthful, nonmisleading, noncoercive" speech. See *ante*, at 573 (BLACKMUN, J., concurring in judgment). If the "commercial speech" is in fact misleading, the "marketplace of ideas" will in time reveal that fact. It may not reveal it sufficiently soon to avoid harm to numerous people, but if the reasoning of Brandeis and Holmes is applied in this context, that was one of the risks we took in protecting free speech in a democratic society.

Unfortunately, although the "marketplace of ideas" has a historically and sensibly defined context in the world of political speech, it has virtually none in the realm of business transactions. Even so staunch a defender of the First Amendment as Mr. Justice Black, in his dissent in *Breard* v. *Alexandria*, 341 U. S., at 650, n., stated:

> "Of course I believe that the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.'"

And yet, with the change in solicitation and advertising techniques, the line between what Central Hudson did here and the peddler selling pots in Alexandria a generation ago is difficult, if not impossible to fix. Doubtless that was why Mr. Justice Black joined the unanimous opinion of the Court in *Valentine* v. *Chrestensen*, 316 U. S., at 54, in which the Court stated:

> "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these pub-

> lic thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.* Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment." (Emphasis added.)

I remain of the view that the Court unlocked a Pandora's Box when it "elevated" commercial speech to the level of traditional political speech by according it First Amendment protection in *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976). The line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since *Virginia Pharmacy Board*. For in the world of political advocacy and *its* marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective "truth," but because it is essential to our system of self-government.

The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim *"caveat emptor."* But since "fraudulent speech" in this area is to be remediable under *Virginia Pharmacy Board, supra*, the remedy of one defrauded is a lawsuit or an agency proceeding based on common-law notions of fraud that are separated by a world of difference

from the realm of politics and government. What time, legal decisions, and common sense have so widely severed, I declined to join in *Virginia Pharmacy Board*, and regret now to see the Court reaping the seeds that it there sowed. For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.

III

The Court concedes that the state interest in energy conservation is plainly substantial, *ante*, at 568, as is the State's concern that its rates be fair and efficient. *Ante*, at 569. It also concedes that there is a direct link between the Commission's ban on promotional advertising and the State's interest in conservation. *Ibid.* The Court nonetheless strikes down the ban on promotional advertising because the Commission has failed to demonstrate, under the final part of the Court's four-part test, that its regulation is no more extensive than necessary to serve the State's interest. *Ante*, at 569–571. In reaching this conclusion, the Court conjures up potential advertisements that a utility might make that conceivably would result in net energy savings. The Court does not indicate that the New York Public Service Commission has in fact construed its ban on "promotional" advertising to preclude the dissemination of information that clearly would result in a net energy savings, nor does it even suggest that the Commission has been confronted with and rejected such an advertising proposal.[6] The final part of the Court's test

[6] Indeed appellee in its brief states:

"[N]either Central Hudson nor any other party made an attempt before the Commission to demonstrate or argue for a specific advertising strategy that would avoid the difficulties that the Commission found inherent in electric utility promotional advertising. The Commission, therefore, continued to enforce its ban on promotion which it had instituted in 1973." Brief for Appellee 15.

The Court makes no attempt to address this statement, or to explain why,

thus leaves room for so many hypothetical "better" ways that any ingenious lawyer will surely seize on one of them to secure the invalidation of what the state agency actually did. As MR. JUSTICE BLACKMUN observed in *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, 188–189 (1979) (concurring opinion):

> "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down."

Here the Court concludes that the State's interest in energy conservation cannot justify a blanket ban on promotional advertising. In its statement of the facts, the Court observes that the Commission's ban on promotional advertising is not "a perfect vehicle for conserving energy." It states:

> "[T]he Commission's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in 'off-peak' consumption, the ban limits the 'beneficial side effects' of such growth in terms of more efficient use of existing powerplants. [App. to Juris. Statement] 37a." *Ante*, at 559.

The Court's analysis in this regard is in my view fundamentally misguided because it fails to recognize that the beneficial side effects of "more efficient use" may be inconsistent with the goal of energy conservation. Indeed, the Commission explicitly found that the promotion of off-peak consumption would impair conservation efforts.[7] The Commission stated:

> "Increased off-peak generation, . . . while conferring

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when no state body has addressed the issue, the Court should nonetheless resolve it by invalidating the state regulation.

[7] In making this finding, the Commission distinguished "between promotional advertising designed to shift existing consumption from peak to off-peak hours and advertising designed to promote additional consump-

> some beneficial side effects, also consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts." App. to Juris. Statement 37a.[8]

The Court also observes, as the Commission acknowledged, that the ban on promotional advertising can achieve only "piecemeal conservationism" because oil dealers are not under the Commission's jurisdiction, and they remain free to advertise. Until I have mastered electrical engineering and marketing, I am not prepared to contradict by virtue of my judicial office those who assume that the ban will be successful in making a substantial contribution to conservation efforts.

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tion during off-peak hours." App. to Juris. Statement 58a, n. 2. It proscribed only the latter. *Ibid.*

[8] And in denying appellant's petition for rehearing, the Commission again stated:

"While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly structured electric rates, is inconsistent with the public interest, even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, requires the burning of scarce oil resources. This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply." *Id.*, at 58a (footnotes omitted).

And I doubt that any of this Court's First Amendment decisions justify striking down the Commission's order because more steps toward conservation could have been made This is especially true when, as here, the Commission lacks authority over oil dealers.

The Court concludes that the Commission's ban on promotional advertising must be struck down because it is more extensive than necessary: it may result in the suppression of advertising by utilities that promotes the use of electrical devices or services that cause no net increase in total energy use. The Court's reasoning in this regard, however, is highly speculative. The Court provides two examples that it claims support its conclusion. It first states that both parties acknowledge that the "heat pump" will be "a major improvement in electric heating," and that but for the ban the utilities would advertise this type of "energy efficien[t]" product.[9] The New York Public Service Commission, however, considered the merits of the heat pump and concluded that it would most likely result in an overall increase in electric energy consumption. The Commission stated:

> "[I]nstallation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak summer air-conditioning as well as on-peak usage

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[9] As previously discussed, however, it does not follow that because a product is "energy efficient" it is also consistent with the goal of energy conservation. Thus, with regard to the heat pump, counsel for appellees stated at oral argument that "Central Hudson says there are some [heat pumps] without air conditioning, but . . . they have never advised us of that." Tr. of Oral Arg. 32–33. The electric heat pump, he continued, "normally carr[ies] with it air conditioning in the summer, and the commission found that this would result in air conditioning that would not otherwise happen." *Id.*, at 33. This is but one example of the veritable Sargasso Sea of difficult nonlegal issues that we wade into by adopting a rule that requires judges to evaluate highly complex and often controversial questions arising in disciplines quite foreign to ours.

> of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently, higher rates for all consumers." App. to Juris. Statement 58a.

Subsidization of peak consumption not only may encourage the use of scarce energy resources during peak periods, but also may lead to larger reserve generating capacity requirements for the State.

The Court next asserts that electric heating as a backup to solar and other heat may be an efficient alternative energy source. *Ante,* at 570. The Court fails to establish, however, that an advertising proposal of this sort was properly presented to the Commission. Indeed, the Court's concession that the Commission did not make findings on this issue suggests that the Commission did not even consider it. Nor does the Court rely on any support for its assertion other than the assertion of appellant. Rather, it speculates that "[i]n the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances." *Ibid.*[10]

Ordinarily it is the role of the State Public Service Commission to make factual determinations concerning whether a device or service will result in a net energy savings and, if so, whether and to what extent state law permits dissemination of information about the device or service. Otherwise,

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[10] Even assuming the Court's speculation is correct, it has shown too little. For the regulation to truly be "no more extensive than necessary," it must be established that a more efficient energy source will serve only as a means for saving energy, rather than as an inducement to consume more energy because the cost has decreased or because other energy using products will be used in conjunction with the more efficient one.

as here, this Court will have no factual basis for its assertions. And the State will never have an opportunity to consider the issue and thus to construe its law in a manner consistent with the Federal Constitution. As stated in *Barrows* v. *Jackson*, 346 U. S. 249, 256–257 (1953):

> "It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. Nor are we so ready to frustrate the expressed will of Congress or that of the state legislatures. Cf. *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 172."

I think the Court would do well to heed the admonition in *Barrows* here. The terms of the order of the New York Public Service Commission in my view indicate that advertising designed to promote net savings in energy use does not fall within the scope of the ban. The order prohibits electric corporations "from *promoting the use of electricity* through the use of advertising, subsidy payments . . . , or employee incentives." App. to Juris. Statement 31a (emphasis added). It is not clear to me that advertising that is likely to result in net savings of energy is advertising that "promot[es] the use of electricity," nor does the Court point to any language in the Commission order that suggests it has adopted this construction. Rather, it would seem more accurate to characterize such advertising as designed to "discourage" the use of electricity.[11] Indeed, I think it is quite likely that the Com-

[11] This characterization is supported by the reasoning of the New York Court of Appeals, which stated:

"[P]romotional advertising . . . seeks . . . to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial informative content, but it may be affirmatively detrimental to the society. . . . Conserving diminishing resources is a matter of vital State concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis." 47 N. Y. 2d, at 110, 390 N. E. 2d, at 757–758.

mission would view advertising that would clearly result in a net savings in energy as consistent with the objectives of its order and therefore permissible.[12] The Commission, for example, has authorized the dissemination of information that would result in *shifts* in electrical energy demand, thereby reducing the demand for electricity during peak periods. *Id.*, at 37a.[13] It has also indicated a willingness to consider at least some other types of "specific proposals" submitted by utilities. *Id.*, at 37a–38a. And it clearly permits informational as opposed to promotional dissemination of information. *Id.*, at 43a–46a. Even if the Commission were ultimately to reject the view that its ban on promotional advertising does not include advertising that results in net energy savings, I think the Commission should at least be given an opportunity to consider it.

It is in my view inappropriate for the Court to invalidate the State's ban on commercial advertising here, based on its speculation that in some cases the advertising may result in a net savings in electrical energy use, and in the cases in which it is clear a net energy savings would result from utility advertising, the Public Service Commission would apply its

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[12] At oral argument counsel for appellant conceded that the ban would not apply to utility advertising promoting the nonuse of electricity. Tr. of Oral Arg. 6. Indeed, counsel stated: "If the use reduces the amount of electricity used, it is not within the ban. The promotional ban is defined as anything which might be expected to increase the use of electricity." *Ibid.* And counsel for appellee stated that "the only thing that is involved here is the promotion by advertising of electric usage." *Id.*, at 30. "And if a showing can be made that promotion in fact is going to conserve energy," counsel for appellee continued, "which . . . has never been made to us, the commission's order says we are ready to relax our ban, we're not interested in banning for the sake of banning it. We think that is basically a bad idea, if we can avoid it. In gas, we have been relaxing it as more gas has become available." *Id.*, at 40.

[13] By contrast, as previously discussed, the Public Service Commission does not permit the promotion of off-peak consumption alone. *Supra*, at 600–601, and n. 8.

ban so as to proscribe such advertising. Even assuming that the Court's speculation is correct, I do not think it follows that facial invalidation of the ban is the appropriate course. As stated in *Parker* v. *Levy*, 417 U. S. 733, 760 (1974), "even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . .' *CSC* v. *Letter Carriers*, 413 U. S. 548, 580–581 (1973)." This is clearly the case here.

For the foregoing reasons, I would affirm the judgment of the New York Court of Appeals.

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSN., AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–672. Argued April 15, 1980—Decided June 20, 1980

Safeco Title Insurance Co. does business with several title companies that derive over 90% of their gross incomes from the sale of Safeco insurance policies. When contract negotiations between Safeco and respondent Union, the bargaining representative for certain Safeco employees, reached an impasse, the employees went on strike. The Union picketed each of the title companies, urging customers to support the strike by canceling their Safeco policies. Safeco and one of the title companies filed complaints with the National Labor Relations Board, charging that the Union had engaged in an unfair labor practice by picketing in order to promote a secondary boycott against the title companies. The Board agreed and ordered the Union to cease picketing. The Board held that the Union's secondary picketing violated § 8 (b) (4) (ii) (B) of the National Labor Relations Act, which makes it an unfair labor practice for a union to coerce a person not party to a labor dispute with the object of "forcing or requiring [him] to cease . . . dealing in the [primary] produc[t] . . . or to cease doing business with" the primary employer. The Court of Appeals set aside the Board's order. Although the court held that the title companies were neutral parties entitled to the benefit of § 8 (b) (4) (ii) (B), it concluded that the Union's activity was lawful product picketing.

Held:

The judgment is reversed, and the case is remanded. Pp. 611–616; 616–618; 618–619.

194 U. S. App. D. C. 400, 600 F. 2d 280, and 201 U. S. App. D. C. 147, 627 F. 2d 1133, reversed and remanded.

MR. JUSTICE POWELL delivered the opinion of the Court with respect to Parts I and II, concluding that respondent Union's secondary picketing violated § 8 (b) (4) (ii) (B). *NLRB* v. *Fruit Packers*, 377 U. S. 58, distinguished. Secondary product picketing, such as respondent Union conducted, that reasonably can be expected to threaten neutral parties with ruin or substantial loss does not square with § 8 (b) (4) (ii) (B)'s

language or purpose. Since successful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco, the picketing plainly violated the statutory ban on the coercion of neutral parties with the object of forcing them to cease dealing in the primary product or to cease doing business with the primary employer. Pp. 611–615.

MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST, concluded in Part III that as applied to picketing that predictably encourages consumers to boycott a secondary business, § 8 (b) (4) (ii) (B) imposes no unconstitutional restrictions upon speech protected by the First Amendment. P. 616.

MR. JUSTICE BLACKMUN, concurring in the result, expressed a reluctance to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife. Pp. 616–618.

MR. JUSTICE STEVENS concluded that the statute in question is consistent with the First Amendment because the restrictions on picketing it imposes are sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor dispute. Pp. 618–619.

POWELL, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I and II, in which BURGER, C. J., and STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined, and an opinion with respect to Part III, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined. BLACKMUN, J., *post*, p. 616, and STEVENS, J., *post*, p. 618, filed opinions concurring in part and in the result. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 619.

Norton J. Come argued the cause for petitioner. With him on the briefs were *Solicitor General McCree* and *Linda Sher*. *Bruce Michael Cross* filed a brief for the Safeco Title Insurance Co., respondent under this Court's Rule 21 (4), in support of petitioner.

Laurence Gold argued the cause for respondent Retail Store Employees Union. With him on the brief were *James H. Webster*, *J. Albert Woll*, and *George Kaufmann*.*

**Andrew M. Kramer*, *Adin C. Goldberg*, and *Stephen A. Bokat* filed a

MR. JUSTICE POWELL delivered the opinion of the Court.†

The question is whether § 8 (b)(4)(ii)(B) of the National Labor Relations Act, 29 U. S. C. § 158 (b)(4)(ii)(B), forbids secondary picketing against a struck product when such picketing predictably encourages consumers to boycott a neutral party's business.

I

Safeco Title Insurance Co. underwrites real estate title insurance in the State of Washington. It maintains close business relationships with five local title companies.[1] The companies search land titles, perform escrow services, and sell title insurance. Over 90% of their gross incomes derives from the sale of Safeco insurance. Safeco has substantial stockholdings in each title company, and at least one Safeco officer serves on each company's board of directors. Safeco, however, has no control over the companies' daily operations. It does not direct their personnel policies, and it never exchanges employees with them.

Local 1001 of the Retail Store Employees Union became the certified bargaining representative for certain Safeco employees in 1974. When contract negotiations between Safeco and the Union reached an impasse, the employees went on strike. The Union did not confine picketing to Safeco's office in Seattle. The Union also picketed each of the five local title companies. The pickets carried signs

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brief for the Chamber of Commerce of the United States of America as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Jack Greenberg* and *Eric Schnapper* for the NAACP Legal Defense and Educational Fund, Inc.; and by *David C. Vladeck* and *Alan B. Morrison* for Public Citizen et al.

†Part III of the opinion is joined only by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST.

[1] The title companies are Land Title Co. of Clark County, Land Title Co. of Cowlitz County, Land Title Co. of Kitsap County, Land Title Co. of Pierce County, and Land Title Co. of Snohomish County.

declaring that Safeco had no contract with the Union,[2] and they distributed handbills asking consumers to support the strike by canceling their Safeco policies.[3]

Safeco and one of the title companies filed complaints with the National Labor Relations Board. They charged that the Union had engaged in an unfair labor practice by picketing in order to promote a secondary boycott against the title companies. The Board agreed. 226 N. L. R. B. 754 (1976).[4] It found the title companies to be neutral in the dispute between Safeco and the Union. *Id.*, at 756. The Board then concluded that the Union's picketing violated § 8 (b)(4)(ii)(B) of the National Labor Relations Act. The Union had directed its appeal against Safeco insurance policies. But since the sale of those policies accounted for substantially all of the title companies' business, the Board found that the Union's action was "reasonably calculated to induce customers not to patronize the neutral parties at all." 226 N. L. R. B., at 757. The Board therefore rejected the Union's reliance upon *NLRB* v. *Fruit Packers*, 377 U. S. 58 (1964) (*Tree Fruits*), which held that § 8 (b)(4)(ii)(B) allows secondary picketing against a struck product. It ordered the Union to cease picketing and to take limited corrective action.

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[2] The picket signs read:

"SAFECO NONUNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001."

[3] The distribution of handbills has not been an issue in this case. Section 8 (b)(4) of the National Labor Relations Act does not prohibit "publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . ." 61 Stat. 141, as amended, 73 Stat. 543, 29 U. S. C. § 158 (b)(4).

[4] The parties waived intermediate proceedings before an administrative law judge and submitted the stipulated facts directly to the Board. 226 N. L. R. B., at 754.

The United States Court of Appeals for the District of Columbia Circuit set aside the Board's order. 194 U. S. App. D. C. 400, 600 F. 2d 280 (1979) (en banc). The court agreed that the title companies were neutral parties entitled to the benefit of § 8 (b)(4)(ii)(B). 201 U. S. App. D. C. 147, 151, 627 F. 2d 1133, 1137 (1979). It held, however, that *Tree Fruits* leaves neutrals susceptible to whatever consequences may flow from secondary picketing against the consumption of products produced by an employer involved in a labor dispute. Even when product picketing predictably encourages consumers to boycott a neutral altogether, the court concluded, § 8 (b)(4)(ii)(B) provides no protection. 201 U. S. App. D. C., at 159–160, 627 F. 2d, at 1145–1146.

We granted a writ of certiorari to consider whether the Court of Appeals correctly understood § 8 (b)(4)(ii)(B) as interpreted in *Tree Fruits*. 444 U. S. 1011 (1980).[5] Having concluded that the Court of Appeals misapplied the statute, we now reverse and remand for enforcement of the Board's order.

II

Section 8 (b)(4)(ii)(B) of the National Labor Relations Act makes it "an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain" a person not party to a labor dispute "where . . . an object thereof is . . . forcing or requiring [him] to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person. . . ."[6]

In *Tree Fruits*, the Court held that § 8 (b)(4)(ii)(B) does not prohibit all peaceful picketing at secondary sites. There, a union striking certain Washington fruit packers picketed large supermarkets in order to persuade consumers not to buy

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[5] The Union has not challenged the Court of Appeals' determination that the title companies are neutral, secondary parties.

[6] 61 Stat. 141, as amended, 73 Stat. 542, 29 U. S. C. § 158 (b)(4)(ii)(B).

Washington apples. Concerned that a broad ban against such picketing might run afoul of the First Amendment, the Court found the statute directed to an " 'isolated evil.' " The evil was use of secondary picketing "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." 377 U. S., at 63. Congress intended to protect secondary parties from pressures that might embroil them in the labor disputes of others, but not to shield them from business losses caused by a campaign that successfully persuades consumers "to boycott the primary employer's goods." *Ibid.* Thus, the Court drew a distinction between picketing "to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer" and picketing that "only persuades his customers not to buy the struck product." *Id.*, at 70. The picketing in that case, which "merely follow[ed] the struck product," did not " 'threaten, coerce, or restrain' " the secondary party within the meaning of § 8 (b)(4)(ii)(B). 377 U. S., at 72.

Although *Tree Fruits* suggested that secondary picketing against a struck product and secondary picketing against a neutral party were "poles apart," *id.*, at 70, the courts soon discovered that product picketing could have the same effect as an illegal secondary boycott. In *Hoffman ex rel. NLRB* v. *Cement Masons Local 337*, 468 F. 2d 1187 (CA9 1972), cert. denied, 411 U. S. 986 (1973), for example, a union embroiled with a general contractor picketed the housing subdivision that he had constructed for a real estate developer. Pickets sought to persuade prospective purchasers not to buy the contractor's houses. The picketing was held illegal because purchasers "could reasonably expect that they were being asked not to transact any business whatsoever" with the neutral developer. 468 F. 2d, at 1192. "[W]hen a union's interest in picketing a primary employer at a 'one product' site [di-

rectly conflicts] with the need to protect . . . neutral employers from the labor disputes of others," Congress has determined that the neutrals' interests should prevail. *Id.*, at 1191.[7]

Cement Masons highlights the critical difference between the picketing in this case and the picketing at issue in *Tree Fruits*. The product picketed in *Tree Fruits* was but one item among the many that made up the retailer's trade. 377 U. S., at 60. If the appeal against such a product succeeds, the Court observed, it simply induces the neutral retailer to reduce his orders for the product or "to drop the item as a poor seller." *Id.*, at 73. The decline in sales attributable to consumer rejection of the struck product puts pressure upon the primary employer, and the marginal injury to the neutral retailer is purely incidental to the product boycott. The neutral therefore has little reason to become involved in the labor dispute. In this case, on the other hand, the title companies sell only the primary employer's product and perform the services associated with it. Secondary picketing against consumption of the primary product leaves responsive consumers no realistic option other than to boycott the title companies altogether. If the appeal succeeds, each company "stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on [its] business generally." Thus, "the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." *Id.*, at 72. Such an expansion of

[7] The so-called merged product cases also involve situations where an attempt to follow the struck product inevitably encourages an illegal boycott of the neutral party. See *K & K Construction Co.* v. *NLRB*, 592 F. 2d 1228, 1231–1234 (CA3 1979); *American Bread Co.* v. *NLRB*, 411 F. 2d 147, 154–155 (CA6 1969); *Honolulu Typographical Union No. 37* v. *NLRB*, 131 U. S. App. D. C. 1, 3–4, 401 F. 2d 952, 954–955 (1968); Note, Consumer Picketing and the Single-Product Secondary Employer, 47 U. Chi. L. Rev. 112, 132–136 (1979).

labor discord was one of the evils that Congress intended § 8 (b)(4)(ii)(B) to prevent. 377 U. S., at 63–64.

As long as secondary picketing only discourages consumption of a struck product, incidental injury to the neutral is a natural consequence of an effective primary boycott. See *id.*, at 72–73. But the Union's secondary appeal against the central product sold by the title companies in this case is "reasonably calculated to induce customers not to patronize the neutral parties at all." 226 N. L. R. B., at 757.[8] The resulting injury to their businesses is distinctly different from the injury that the Court considered in *Tree Fruits*.[9] Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square

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[8] See *Local 14055, United Steelworkers (Dow Chemical Co.)*, 211 N. L. R. B. 649, 651–652 (1974), enf. denied, 173 U. S. App. D. C. 299, 524 F. 2d 853 (1975), vacated and remanded, 429 U. S. 807 (1976), complaint dism'd, 229 N. L. R. B. 302 (1977).

We do not disagree with MR. JUSTICE BRENNAN's dissenting view that successful secondary product picketing may have no greater effect upon a neutral than a legal primary boycott. *Post*, at 623. But when the neutral's business depends upon the products of a particular primary employer, secondary product picketing can produce injury almost identical to the harm resulting from an illegal secondary boycott. See generally Duerr, Developing a Standard for Secondary Consumer Picketing, 26 Lab. L. J. 585 (1975). Congress intended § 8 (b)(4)(ii)(B) to protect neutrals from that type of coercion. MR. JUSTICE BRENNAN's view that the legality of secondary picketing should depend upon whether the pickets "urge only a boycott of the primary employer's product," *post*, at 622, would provide little or no protection. No well-advised union would allow secondary pickets to carry placards urging anything other than a product boycott. Section 8 (b)(4)(ii)(B) cannot bear a construction so inconsistent with the congressional intention to prevent neutrals from becoming innocent victims in contests between others.

[9] The Union is responsible for the "foreseeable consequences" of its conduct. *NLRB* v. *Operating Engineers*, 400 U. S. 297, 304–305 (1971); see *Radio Officers* v. *NLRB*, 347 U. S. 17, 45 (1954). See also *NLRB* v. *Denver Building Council*, 341 U. S. 675, 689 (1951).

with the language or the purpose of § 8 (b)(4)(ii)(B).[10] Since successful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco, the picketing plainly violates the statutory ban on the coercion of neutrals with the object of "forcing or requiring [them] to cease . . . dealing in the [primary] produc[t] . . . or to cease doing business with" the primary employer. § 8 (b)(4)(ii)(B); see *Tree Fruits*, 377 U. S., at 68.[11]

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[10] Representative Griffin, a sponsor of the Landrum-Griffin amendments that brought § 8 (b)(4)(ii)(B) into law, emphasized to the Congress that the statute would outlaw secondary picketing likely to coerce the neutral party. "If the purpose of the picketing," he said, "is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped." 105 Cong. Rec. 15673 (1959), reprinted in 2 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1615 (1959).

Senator McClellan, who offered a bill quite similar to the statute actually adopted, noted that secondary picketing is particularly likely to coerce neutrals who have based their businesses upon one manufacturer's products. He pointed out:

"[W]e have cases of merchants who for 20 years, 10 years, or for a long period of time, may have been handling a particular brand of product. A merchant may have built his business around the product, such as the John Deere plows or some kind of machinery from some other company. The merchant may have built up his trade entirely on that product." 105 Cong. Rec. 6667 (1959), reprinted in 2 Legislative History, *supra*, at 1194.

[11] The picketing in *Tree Fruits* and the picketing in this case are relatively extreme examples of the spectrum of conduct that the Board and the courts will encounter in complaints charging violations of § 8 (b) (4) (ii) (B). If secondary picketing were directed against a product representing a major portion of a neutral's business, but significantly less than that represented by a single dominant product, neither *Tree Fruits* nor today's decision necessarily would control. The critical question would be whether, by encouraging customers to reject the struck product, the secondary appeal is reasonably likely to threaten the neutral party with ruin

III

The Court of Appeals suggested that application of § 8 (b) (4)(ii)(B) to the picketing in this case might violate the First Amendment. 201 U. S. App. D. C., at 161, 627 F. 2d, at 1147. We think not. Although the Court recognized in *Tree Fruits* that the Constitution might not permit "a broad ban against peaceful picketing," the Court left no doubt that Congress may prohibit secondary picketing calculated "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." 377 U. S., at 63. Such picketing spreads labor discord by coercing a neutral party to join the fray. In *Electrical Workers* v. *NLRB*, 341 U. S. 694, 705 (1951), this Court expressly held that a prohibition on "picketing in furtherance of [such] unlawful objectives" did not offend the First Amendment. See *American Radio Assn.* v. *Mobile S.S. Assn.*, 419 U. S. 215, 229–231 (1974); *Teamsters* v. *Vogt, Inc.*, 354 U. S. 284 (1957). We perceive no reason to depart from that well-established understanding. As applied to picketing that predictably encourages consumers to boycott a secondary business, § 8 (b) (4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded with directions to enforce the National Labor Relations Board's order.

So ordered.

MR. JUSTICE BLACKMUN, concurring in part and concurring in the result.

I join Parts I and II of the Court's opinion, but not Part III. The plurality's cursory discussion of what for me are difficult First Amendment issues presented by this case fails to

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or substantial loss. Resolution of the question in each case will be entrusted to the Board's expertise.

take account of the effect of this Court's decision in *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972), on the question whether the National Labor Relations Act's content-based ban on peaceful picketing of secondary employers is constitutional. The failure to take *Mosley* into account is particularly ironic given that the Court today reaffirms and extends the principles of that case in *Carey* v. *Brown*, *ante*, p. 455.

In *NLRB* v. *Fruit Packers*, 377 U. S. 58, 76 (1964), Mr. Justice Black wrote a concurring opinion in which he concluded that § 8 (b)(4)(ii)(B) of the National Labor Relations Act "abridges freedom of speech and press in violation of the First Amendment." He said:

> "In short, we have neither a case in which picketing is banned because the picketers are asking others to do something unlawful nor a case in which *all* picketing is, for reasons of public order, banned. Instead, we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views. The result is an abridgement of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment." 377 U. S., at 79. (Emphasis in original.)

These views, central to Mr. Justice Black's vision of the First Amendment, were, one would have supposed until today, "accepted" by the Court in *Mosley*. See 408 U. S., at 98.

I have never been fully comfortable with *Mosley*'s equating all content selectivity in affording access to picketers with censorship. See *Mosley*, 408 U. S., at 102 (concurring statement). For this reason, I join today in MR. JUSTICE REHNQUIST's dissenting opinion in *Carey* v. *Brown*. I concur in the result in this case, however, only because I am reluctant to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability

of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife. My vote should not be read as foreclosing an opposite conclusion where another statutory ban on peaceful picketing, unsupported by equally substantial governmental interests, is at issue.

MR. JUSTICE STEVENS, concurring in part and concurring in the result.

For the reasons stated by Mr. Justice Harlan and Mr. Justice Black in their separate opinions in *NLRB* v. *Fruit Packers*, 377 U. S. 58, 76, 80 (*Tree Fruits*), I am persuaded that Congress intended to prohibit this secondary picketing, and for the reasons stated by MR. JUSTICE POWELL, I agree that this case is not governed by *Tree Fruits*. I therefore join Parts I and II of the Court's opinion.

The constitutional issue, however, is not quite as easy as the plurality would make it seem because, as Mr. Justice Black pointed out in *Tree Fruits*, "we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views." *Id.*, at 79. In other words, this is another situation in which regulation of the means of expression is predicated squarely on its content. See *Consolidated Edison Co.* v. *Public Service Comm'n*, *ante*, at 546 (STEVENS, J., concurring in judgment). I agree with the plurality that this content-based restriction is permissible but not simply because it is in furtherance of objectives deemed unlawful by Congress. *Ante*, at 616. That a statute proscribes the otherwise lawful expression of views in a particular manner and at a particular location cannot in itself totally justify the restriction. Otherwise the First Amendment would place no limit on Congress' power. In my judgment, it is our responsibility to determine whether the method or manner of expression, considered in context, justifies the particular restriction.

I have little difficulty in concluding that the restriction at issue in this case is constitutional. Like so many other kinds

of expression, picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment. In his concurring opinion in *Bakery Drivers* v. *Wohl*, 315 U. S. 769, 776–777, Mr. Justice Douglas stated:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."*

Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.

The statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea. And the restriction on picketing is limited in geographical scope to sites of neutrals in the labor dispute. Because I believe that such restrictions on conduct are sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor dispute, I agree that the statute is consistent with the First Amendment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

NLRB v. *Fruit Packers*, 377 U. S. 58 (1964) (*Tree Fruits*), held that it was permissible under § 8 (b)(4)(ii)(B) of the

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*See also *Teamsters* v. *Vogt, Inc.*, 354 U. S. 284, 289; *Hughes* v. *Superior Court*, 339 U. S. 460, 465–466, 468.

National Labor Relations Act (NLRA) [1] for a union involved in a labor dispute with a primary employer to conduct peaceful picketing at a secondary site with the object of persuading consumers to boycott the primary employer's product. Today's decision stunts *Tree Fruits* by declaring that secondary site picketing is illegal when the primary employer's product at which it is aimed happens to be the only product which the secondary retailer distributes. I dissent.

The NLRA does not place the secondary site off limits to all consumer picketing over the dispute with the primary employer. *Tree Fruits, supra,* at 63. The Act only prohibits a labor union from picketing to "coerce" a secondary firm into joining the union's struggle against the primary employer. § 8 (b)(4)(ii)(B). But inasmuch as the secondary retailer is, by definition, at least partially dependent upon the sale of the primary employer's goods, the secondary firm will necessarily feel the pressure of labor activity pointed at the primary enterprise. Thus, the pivotal problem in secondary site picketing cases is determining when the pressure imposed by consumer picketing is illegitimate, and therefore deemed to "coerce" the secondary retailer.

Tree Fruits addressed this problem by focusing upon whether picketing at the secondary site is directed at the primary employer's product, or whether it more broadly exhorts customers to withhold patronage from the full range of goods carried by the secondary retailer, *including those goods originating from nonprimary sources.* The *Tree Fruits* test reflects the distinction between economic damage sustained by the secondary firm solely by virtue of its dependence upon the primary employer's goods, and injuries inflicted upon interests of the secondary firm that are unrelated to the primary dispute—injuries that are calculated to influence the secondary retailer's conduct with respect to the primary dispute.

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[1] As amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), § 704 (a), 73 Stat. 542–543, 29 U. S. C. § 158 (b)(4).

The former sort of harm is simply the result of union success in its conflict with the primary employer. The secondary firm is hurt only insofar as it entwines its economic fate with that of the primary employer by carrying the latter's goods. To be sure, the secondary site may be a battleground; but the secondary retailer, in its own right, is not enlisted as a combatant.

The latter kind of economic harm to the secondary firm, however, does not involve merely the necessary commercial fallout from the primary dispute. Appeals to boycott nonprimary goods sold by a secondary retailer place more at stake for the retailer than the risk it has assumed by handling the primary employer's product. Four considerations indicate that this broader pressure is highly undesirable from the standpoint of labor policy. First, nonprimary product boycotts distort the strength of consumer response to the primary dispute; the secondary retailer's decision to continue purchasing the primary employer's line becomes a function of consumer reaction to the primary conflict *amplified* by the impact of the boycott upon nonprimary goods. *Tree Fruits, supra,* at 72, and n. 20. Second, although it seems proper to compel the producer or retailer of an individual primary product to internalize the costs of labor conflict engendered in the course of the item's production, a nonprimary product boycott may unfairly impose multiple costs upon the secondary retailer who does not wish to terminate his relationship with the primary employer. Third, nonprimary product boycotts attack interests of the secondary firm that are not derivative of the interests of the primary enterprise; because the retailer thereby becomes an independent disputant, the primary labor controversy may be aggravated and complicated. Finally, by affecting the sales of nonprimary goods handled by the secondary firm, the disruptive effect of the primary dispute is felt even by those businesses that manufacture and sell nonprimary products to the secondary retailer.

These sound reasons support *Tree Fruits'* conclusion that the legality of secondary site picketing should turn upon

whether the union pickets urge only a boycott of the primary employer's product. 377 U. S., at 63–64, 71–72.[2] Concomitantly, *Tree Fruits* expressly rejected the notion that the coerciveness of picketing should depend upon the extent of loss suffered by the secondary firm through diminished purchases of the primary product. *Id.*, at 72–73. Nevertheless, the Court has now apparently abandoned the *Tree Fruits* approach, choosing instead to identify coerciveness with the percentage of the secondary firm's business made up by the primary product.

The conceptual underpinnings of this new standard are seriously flawed. The type of economic pressure exerted upon the secondary retailer by a primary product boycott is the same whatever the percentage of its business the primary product composes—in each case, a decline in sales at the secondary outlet may well lead either to a decrease in purchases from the primary employer or to product substitution. To be sure, the damaging effect of this pressure upon individual secondary firms will vary, but it is far from clear that the harmfulness of a primary product boycott is necessarily correlated with the percentage of the secondary firm's business the product constitutes. For example, a marginally profitable large retailer may handle a multiplicity of products, yet find the decrease in sales of a single, very profitable, primary product ruinous. A small healthy single product secondary retailer, on the other hand, might be able to sustain losses during a boycott, or substitute a comparable product.

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[2] Because a "merged product" consists in part of nonprimary products, the prohibition of "merged product" boycotts follows as a matter of logic and of policy from *Tree Fruits*' primary product boycott test. Thus, "merged product" cases, see, *e. g.*, *American Bread Co.* v. *NLRB*, 411 F. 2d 147, 154 (CA6 1969), do not support the Court's view that certain purely primary product boycotts are proscribed by the National Labor Relations Act. In fact, "merged product" boycotts are wholly different than primary product boycotts against single product retailers. "Merged product" boycotts need not entail a total withholding of patronage from the secondary retailer, which may carry other, nonmerged, products.

Moreover, it is odd to treat the NLRA's prohibition against coercion of neutral secondary parties as a means of protecting single product secondary firms from the effects of a successful primary product boycott. A single product retailer will always suffer a degree of harm incident to a successful primary product boycott, whether or not the retailer becomes the focus of union activity. Thus, a ban on coercion of neutral businesses is mismatched to the goal of averting that harm. Far more sensible would be to read the statutory ban on coercion of neutral parties as shielding secondary firms from the injuries that ensue precisely because of union conduct aimed at them. Nonprimary product boycotts fall within this category because they are specifically targeted at the secondary retailer.

Unlike the *Tree Fruits* rule, the test formulated by the Court in this case is not rooted in the policy of maintaining secondary firm neutrality with respect to the primary dispute. There is no ground to believe that a single product secondary retailer is more prone than a multiproduct retailer to react to a primary product boycott by joining the union in its struggle against the primary employer. On the contrary, the single product secondary firm is likely to be the primary employer's strongest ally because of the alignment of their respective economic interests. Nor is it especially unfair to subject the single product retailer to a primary product boycott. Whatever the percentage of a retailer's business that is constituted by a given item, the retailer necessarily assumes the risks of interrupted supply or declining sales that follow when labor conflict embroils the manufacturer of the item.

By shifting its focus from the nature of the product boycotted to the composition of the secondary firm's business, today's decision substitutes a confusing and unsteady standard for *Tree Fruits'* clear approach to secondary site picketing. Labor unions will no longer be able to assure that their secondary site picketing is lawful by restricting advocacy of a boycott to the primary product, as ordained by *Tree Fruits*.

Instead, picketers will be compelled to guess whether the primary product makes up a sufficient proportion of the retailer's business to trigger the displeasure of the courts or the Labor Relations Board. Indeed, the Court's general disapproval of "[p]roduct picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss . . . ," *ante*, at 614, leaves one wondering whether unions will also have to inspect balance sheets to determine whether the primary product they wish to picket is too profitable for the secondary firm.

I continue to "disagree . . . that the test of 'to threaten, coerce, or restrain' . . . is whether [the secondary retailer] suffered or was likely to suffer economic loss." *Tree Fruits*, *supra*, at 72.[3] I would adhere to the primary product test. Accordingly, I dissent.

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[3] The only fragment of legislative history the Court musters in support of its holding forbidding picketing of single product secondary firms is Senator McClellan's expression of concern that some secondary firms may have developed their business entirely on the basis of " 'a particular brand of product.' " *Ante*, at 615, n. 10, quoting 105 Cong. Rec. 6667 (1959), reprinted in 2 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1194 (1959). But that remark was offered in support of a proposed amendment restricting secondary boycotts that was rejected by the Senate. 2 Legislative History, *supra*, at IX. Section 8 (b) (4) as finally enacted was narrower than Senator McClellan's proposed amendment. See Comment, 32 Stan. L. Rev. 631, 641–642, n. 61 (1980).

BECK *v.* ALABAMA

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 78–6621. Argued February 20, 1980—Decided June 20, 1980

Under Alabama law felony murder is a lesser included offense of the capital crime of robbery-intentional killing. Under the Alabama death penalty statute the trial judge is prohibited from giving the jury the option of convicting the defendant of the lesser included offense; instead, the jury must either convict the defendant of the capital crime, in which case it must impose the death penalty, or acquit him. If the defendant is convicted, the trial judge must hold a hearing to consider aggravating and mitigating circumstances, and may then refuse to impose the death sentence and instead sentence the defendant to life imprisonment. Petitioner was convicted of robbery-intentional killing, and the jury accordingly imposed the death sentence, which the Alabama trial court refused to overturn. At petitioner's trial, his own testimony established his participation in the robbery, but he denied killing, or any intent to kill, the victim. Because of the statutory prohibition, the trial court did not instruct the jury as to the lesser included offense of felony murder. The Alabama appellate courts upheld the conviction and death sentence, rejecting petitioner's constitutional attack on the statutory prohibition on lesser included offense instructions.

Held: The death sentence may not constitutionally be imposed after a jury verdict of guilt of a capital offense where the jury was not permitted to consider a verdict of guilt of a lesser included offense. Pp. 633–646.

(a) Providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard. This procedural safeguard is especially important in cases such as this one. For when the evidence establishes that the defendant is guilty of a serious, violent offense but leaves some doubt as to an element justifying conviction of a capital offense, the failure to give the jury such a "third option" inevitably enhances the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake. Pp. 633–638.

(b) Alabama's argument that, in the context of an apparently mandatory death penalty statute, the preclusion of lesser included offense instructions heightens, rather than diminishes, the reliability of the guilt determination, must be rejected. The unavailability of lesser included

offense instructions and the apparently mandatory nature of the death penalty both interject irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the "third option" may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage the jury to acquit for an equally impermissible reason—that, whatever his crime, the defendant does not deserve death. While in any particular case these two extraneous factors may favor the defendant or the prosecution or may cancel each other out, in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case. Pp. 638–643.

(c) The jury's "option" of refusing to return any verdict at all, thus causing a mistrial, is not an adequate substitute for proper instructions on lesser included offenses. Nor does the fact that the trial judge has the ultimate sentencing power compensate for the risk that the jury may return an improper verdict because of the unavailability of the "third option." If the jury finds the defendant guilty only of a lesser included offense, the judge would not have the opportunity to impose the death sentence. Moreover, the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Under these circumstances, it cannot be presumed that a post-trial hearing will always correct whatever mistakes occurred in the performance of the jury's factfinding function. Pp. 643–646.

365 So. 2d 1006, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 646. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 646. REHNQUIST, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 646.

David Klingsberg argued the cause for petitioner. With him on the briefs were *John A. Herfort, Jay Wishingrad,* and *John L. Carroll.*

Edward E. Carnes, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Charles A. Graddick,* Attorney General.

MR. JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari to decide the following question:

> "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?" 444 U. S. 897.

We now hold that the death penalty may not be imposed under these circumstances.

Petitioner was tried for the capital offense of "[r]obbery or attempts thereof when the victim is intentionally killed by the defendant." [1] Under the Alabama death penalty statute

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[1] There are 14 capital offenses under the Alabama statute, Ala. Code §§ 13-11-2 (a)(1)-(14) (1975):

"(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

"(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

"(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

"(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

"(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

"(6) Any murder committed while the defendant is under sentence of life imprisonment;

"(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

"(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

"(9) Willful setting off or exploding dynamite or other explosive under

the requisite intent to kill may not be supplied by the felony-murder doctrine.[2] Felony murder is thus a lesser included offense of the capital crime of robbery-intentional killing. However, under the statute the judge is specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense.[3] Instead, the jury is given the

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circumstances now punishable by section 13–2–60 or 13–2–61, when a person is intentionally killed by the defendant because of said explosion;

"(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

"(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

"(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

"(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

"(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness."

[2] Alabama Code § 13–11–2 (b) (1975) states that "[e]vidence of intent under this section shall not be supplied by the felony-murder doctrine." In *Ritter* v. *State*, 375 So. 2d 270, 275 (1979), cert. pending, No. 79–5741, the Alabama Supreme Court held that the State could not satisfy its burden of proof under the new death penalty statute simply by showing that the defendant intended to commit robbery or even by showing that he should have known that there was a substantial possibility that someone would be killed. Although the State is not required to prove that the defendant was the actual triggerman, it must show that he had a "particularized intent" to kill the victim or that he "sanctioned and facilitated the crime [of intentional killing] so that his culpability is comparable to that of" the actual killer.

[3] Alabama Code § 13–11–2 (a) (1975) provides:

"If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the

choice of either convicting the defendant of the capital crime, in which case it is required to impose the death penalty, or acquitting him, thus allowing him to escape all penalties for his alleged participation in the crime. If the defendant is convicted and the death penalty imposed, the trial judge must then hold a hearing with respect to aggravating and mitigating circumstances; after hearing the evidence, the judge may refuse to impose the death penalty, sentencing the defendant to life imprisonment without possibility of parole.[4]

In this case petitioner's own testimony established his participation in the robbery of an 80-year-old man named Roy Malone. Petitioner consistently denied, however, that he killed the man or that he intended his death. Under petitioner's version of the events, he and an accomplice entered

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following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses."

The last phrase of this subsection has been consistently construed to preclude any lesser included offense instructions in capital cases. See *Jacobs* v. *State*, 361 So. 2d 640, 646 (Ala. 1978) (Torbert, C. J., concurring in part and dissenting in part), cert. denied, 439 U. S. 1122; *Evans* v. *Birtton*, 472 F. Supp. 707, 714 (SD Ala. 1979).

[4] Alabama Code § 13–11–3 (1975) provides:

"If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13–11–2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13–11–6 and 13–11–7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death."

their victim's home in the afternoon, and, after petitioner had seized the man intending to bind him with a rope, his accomplice unexpectedly struck and killed him. As the State has conceded, absent the statutory prohibition on such instructions, this testimony would have entitled petitioner to a lesser included offense instruction on felony murder as a matter of state law.[5]

Because of the statutory prohibition, the court did not instruct the jury as to the lesser included offense of felony murder. Instead, the jury was told that if petitioner was acquitted of the capital crime of intentional killing in the course of a robbery, he "must be discharged" and "he can never be tried for anything that he ever did to Roy Malone." Record 743. The jury subsequently convicted petitioner and imposed the death penalty; after holding a hearing with respect to aggravating and mitigating factors, the trial court refused to overturn that penalty.

In the courts below petitioner attacked the prohibition on lesser included offense instructions in capital cases, arguing that the Alabama statute was constitutionally indistinguishable from the mandatory death penalty statutes struck down in *Woodson* v. *North Carolina*, 428 U. S. 280, and *Roberts* v. *Louisiana*, 428 U. S. 325.[6] The Alabama Court of Criminal

[5] The Alabama rule in cases other than capital cases is that the defendant is entitled to a lesser included offense instruction if "there is any reasonable theory from the evidence which would support the position." *Fulghum* v. *State*, 291 Ala. 71, 75, 277 So. 2d 886, 890 (1973). The State concedes that under this standard petitioner would have been entitled to instructions on first-degree (felony) murder and robbery. Brief for Respondent 78–79; Tr. of Oral Arg. 23. The parties disagree as to whether petitioner also would have been entitled to an instruction on second-degree murder under state law. We, of course, have no occasion to pass on this issue.

[6] In the trial court petitioner's counsel argued that telling the jury that "you have got a choice of two things, either you can sentence him to die or you can acquit him" unconstitutionally interfered with its fact-finding role and made the statute an unconstitutional mandatory death

Appeals rejected this argument on the ground that the jury's only function under the Alabama statute is to determine guilt or innocence and that the death sentence it is required

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penalty. Record 40. In the Alabama Court of Criminal Appeals the court described petitioner's argument with respect to the constitutionality of the Alabama death penalty statute as follows:

"The trial jury cannot be instructed on lesser included offenses.

"In the absence of such a provision, the appellant insists that the only choice that a petit jury has is imposing death or acquitting the defendant. He states that because only those two choices are presented to the jury, the statute can only be interpreted as having a mandatory death provision." 365 So. 2d 985, 999 (1978).

In his petition for certiorari to the Alabama Supreme Court petitioner specifically stated that he was challenging the Alabama statute as being in violation of the Eighth, Sixth, and Fourteenth Amendments to the United States Constitution and argued that it is "in fact a mandatory death sentence." However, petitioner did not explore these issues more fully in his brief to the Alabama Supreme Court, Tr. of Oral Arg. 5, and, in its one-paragraph opinion affirming the judgment of the Alabama Court of Criminal Appeals, the Supreme Court adverted only to the state constitutional issues petitioner had raised.

In his dissenting opinion MR. JUSTICE REHNQUIST takes the position that we are required to construe the Alabama Supreme Court's failure to address petitioner's federal constitutional claims as a determination that petitioner had waived those claims. We disagree. It is clear that petitioner did present his federal claims in some fashion to the Alabama Supreme Court. The State has never argued that this presentation was insufficient, as a matter of state law, to preserve the issue. On the contrary, in its brief in opposition to the petition for certiorari, the State argued that "the Alabama Appellate Courts have reviewed these matters raised in the petition, fully considered them and correctly decided the issues." Similarly, after certiorari was granted, the State again did not argue that petitioner's due process and Eighth Amendment claims were not properly raised or preserved below.

While the parties of course cannot confer jurisdiction on this Court by agreement, we should not simply brush aside the Alabama Attorney General's view of his own State's law. Cf. *Chambers* v. *Mississippi*, 410 U. S. 284, 290, n. 3. That is especially true in a case such as this, where the death penalty was imposed in a plainly unconstitutional manner. Cf. *Vachon* v. *New Hampshire*, 414 U. S. 478.

to impose after a finding of guilt is merely advisory.[7] In a brief opinion denying review, the Alabama Supreme Court also rejected petitioner's arguments, citing *Jacobs* v. *State*, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U. S. 1122, in which it had upheld the constitutionality of the Alabama death penalty statute against a similar challenge. 365 So. 2d 1006, 1007 (1978).

In this Court petitioner contends that the prohibition on giving lesser included offense instructions in capital cases violates both the Eighth Amendment as made applicable to the States by the Fourteenth Amendment and the Due Process Clause of the Fourteenth Amendment by substantially increasing the risk of error in the factfinding process. Petitioner argues that, in a case in which the evidence clearly establishes the defendant's guilt of a serious noncapital crime such as felony murder, forcing the jury to choose between conviction on the capital offense and acquittal creates a danger that it will resolve any doubts in favor of conviction.[8]

[7] 365 So. 2d, at 1000. The Alabama Court of Criminal Appeals relied on *Jacobs* v. *State*, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U. S. 1122, for this proposition. The majority in *Jacobs* did not specifically discuss the validity of the prohibition on lesser included offense instructions. However, in an opinion concurring in part and dissenting in part, Chief Justice Torbert stated that, far from being suspect, the prohibition helped to save the statute from being an unconstitutional mandatory death penalty. He noted that in *Roberts* v. *Louisiana*, 428 U. S. 325, this Court had struck down a mandatory death penalty statute which required the judge to give the jury the option of convicting on lesser included offenses whether or not such instructions were warranted by the evidence, on the ground that such a statute gave the jury *de facto*, standardless sentencing discretion. Because Alabama's statute withdraws from the jury the discretion to control the imposition of the death penalty by convicting the defendant on a lesser included offense and because it is the judge and not the jury who does the actual sentencing, the chief justice concluded that the statute was acceptable as a matter of federal constitutional law.

[8] Petitioner also argues that, because Alabama law requires a trial judge to give lesser included offense instructions where appropriate in noncapital cases, the total prohibition on such instructions in capital cases con-

In response, Alabama argues that the preclusion of lesser included offense instructions does not impair the reliability of the factfinding process or prejudice the defendant in any way. Rather, it argues that the apparently mandatory death penalty will make the jury more prone to acquit in a doubtful case and that the jury's ability to force a mistrial by refusing to return a verdict acts as a viable third option in a case in which the jury has doubts but is nevertheless unwilling to acquit. The State also contends that prohibiting lesser included offense instructions is a reasonable way of assuring that the death penalty is not imposed arbitrarily and capriciously as a result of compromise verdicts. Finally, it argues that any error in the imposition of the death penalty by the jury can be cured by the judge after a hearing on aggravating and mitigating circumstances.

I

At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged.[9] This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged. See 2 C. Wright, Federal Practice and Procedure § 515, n. 54 (1969). But it has long been recognized that it can also be beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. As MR. JUSTICE BRENNAN explained in his opinion

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stitutes an irrational discrimination violative of the Equal Protection Clause of the Fourteenth Amendment. In view of our disposition of the case, it is not necessary to consider this issue. Moreover, petitioner failed to raise this claim in the courts below.

[9] 2 M. Hale, Pleas of the Crown 301–302 (1736); 2 W. Hawkins, Pleas of the Crown 623 (6th ed. 1787); 1 J. Chitty, Criminal Law 250 (5th Am. ed. 1847); T. Starkie, Treatise on Criminal Pleading 351–352 (2d ed. 1822).

for the Court in *Keeble* v. *United States*, 412 U. S. 205, 208, providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard:

> "Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option—convicting the defendant of simple assault—could not have resulted in a different verdict. Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an

instruction would raise difficult constitutional questions." *Id.*, at 212–213 (emphasis in original).

Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is unique in American criminal law.[10] In the federal courts, it has long been "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble* v. *United States*, *supra*, at 208.[11] Similarly, the state courts that have ad-

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[10] Mississippi's post-*Furman* death penalty statute also contained a prohibition on charging lesser included offenses. In *Jackson* v. *State*, 337 So. 2d 1242, 1255 (1976), the Mississippi Supreme Court struck down this part of the statute on the ground that it "constitutes an impediment to full and complete administration of justice in the trial of capital cases and is therefore not binding on the courts. . . ." While warning that lesser included offense instructions should not be given "indiscriminately or automatically," the court held that they should continue to be given when "warranted by the evidence."

[11] This principle was first announced in *Stevenson* v. *United States*, 162 U. S. 313, 323:

"A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter."

See also *Berra* v. *United States*, 351 U. S. 131, 134, where Mr. Justice Harlan indicated that the defendant's entitlement to such an instruction could not be doubted:

"In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense. See *Stevenson* v. *United States*, 162 U. S. 313."

Rule 31 (c) of the Federal Rules of Criminal Procedure provides that "[t]he defendant may be found guilty of an offense necessarily included

dressed the issue have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it.[12] Indeed, for all noncapital crimes

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in the offense charged. . . ." Although the Rule is permissively phrased, it has been universally interpreted as granting a defendant a right to a requested lesser included offense instruction if the evidence warrants it. See, *e. g.*, *United States* v. *Scharf*, 558 F. 2d 498, 502 (CA8 1977); *United States* v. *Crutchfield*, 547 F. 2d 496, 500 (CA9 1977); *Government of Virgin Islands* v. *Carmona*, 422 F. 2d 95, 100 (CA3 1970); 2 C. Wright, Federal Practice and Procedure § 515, n. 57 (1969).

[12] Although the States vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction, they agree that it must be given when supported by the evidence. See, *e. g.*, *Christie* v. *State*, 580 P. 2d 310 (Alaska 1978); *State* v. *Valencia*, 121 Ariz. 191, 589 P. 2d 434 (1979); *Westbrook* v. *State*, 265 Ark. 736, 580 S. W. 2d 702 (1979); *People* v. *Preston*, 9 Cal. 3d 308, 508 P. 2d 300 (1973); *People* v. *White*, 191 Colo. 353, 553 P. 2d 68 (1976); *State* v. *Brown*, 173 Conn. 254, 377 A. 2d 268 (1977); *Matthews* v. *State*, 310 A. 2d 645 (Del. 1973); *State* v. *Terry*, 336 So. 2d 65 (Fla. 1976); *Loury* v. *State*, 147 Ga. App. 152, 248 S. E. 2d 291 (1978); *State* v. *Travis*, 45 Haw. 435, 368 P. 2d 883 (1962); *State* v. *Beason*, 95 Idaho 267, 506 P. 2d 1340 (1973); *People* v. *Simpson*, 57 Ill. App. 3d 442, 373 N. E. 2d 809 (1978); *Pruitt* v. *State*, 269 Ind. 559, 382 N. E. 2d 150 (1978); *State* v. *Millspaugh*, 257 N. W. 2d 513 (Iowa 1977); *State* v. *White*, 225 Kan. 87, 587 P. 2d 1259 (1978); *Martin* v. *Commonwealth*, 571 S. W. 2d 613 (Ky. 1978); *State* v. *Carmichael*, 405 A. 2d 732 (Me. 1979); *Blackwell* v. *State*, 278 Md. 466, 365 A. 2d 545 (1976), cert. denied, 431 U. S. 918; *Commonwealth* v. *Santo*, 375 Mass. 299, 376 N. E. 2d 866 (1978); *People* v. *Jones*, 395 Mich. 379, 236 N. W. 2d 461 (1975); *State* v. *Merrill*, 274 N. W. 2d 99 (Minn. 1978); *Jackson* v. *State*, 337 So. 2d 1242 (Miss. 1976); *State* v. *Stone*, 571 S. W. 2d 486 (Mo. App. 1978); *State* v. *Ostwald*, 180 Mont. 530, 591 P. 2d 646 (1979); *State* v. *Hegwood*, 202 Neb. 379, 275 N. W. 2d 605 (1979); *Colle* v. *State*, 85 Nev. 289, 454 P. 2d 21 (1969); *State* v. *Boone*, 119 N. H. 594, 406 A. 2d 113 (1979); *State* v. *Saulnier*, 63 N. J. 199, 306 A. 2d 67 (1973); *State* v. *Aubrey*, 91 N. M. 1, 569 P. 2d 411 (1977); *People* v. *Henderson*, 41 N. Y. 2d 233, 359 N. E. 2d 1357 (1976); *State* v. *Drumgold*, 297 N. C. 267, 254 S. E. 2d 531 (1979); *State* v. *Piper*, 261 N. W. 2d 650 (N. D. 1977); *State* v. *Kilby*, 50 Ohio St. 2d 21, 361 N. W. 2d 1336 (1977); *Gilbreath* v. *State*, 555 P. 2d 69 (Okla. Crim. App. 1976); *State* v. *Thayer*, 32 Ore. App. 193, 573 P. 2d 758 (1978); *Commonwealth* v. *Terrell*, 482 Pa.

Alabama itself gives the defendant a right to such instructions under appropriate circumstances. See n. 5, *supra*.

While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on

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303, 393 A. 2d 1117 (1978); *State* v. *Funchess*, 267 S. C. 427, 229 S. E. 2d 331 (1976); *State* v. *Grimes*, 90 S. D. 43, 237 N. W. 2d 900 (1976); *Howard* v. *State*, 578 S. W. 2d 83 (Tenn. 1979); *Day* v. *State*, 532 S. W. 2d 302 (Tex. Crim. App. 1975); *State* v. *Gillian*, 23 Utah 2d 372, 463 P. 2d 811 (1970); *Painter* v. *Commonwealth*, 210 Va. 360, 171 S. E. 2d 166 (1969); *State* v. *Workman*, 90 Wash. 2d 443, 584 P. 2d 382 (1978); *State* v. *Wayne*, — W. Va. —, 245 S. E. 2d 838 (1978); *Leach* v. *State*, 83 Wis. 2d 199, 265 N. W. 2d 495 (1978); *Jones* v. *State*, 580 P. 2d 1150 (Wyo. 1978).

reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (opinion of STEVENS, J.).

To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.[13] The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.[14]

II

Alabama argues, however, that petitioner's factual premise is wrong and that, in the context of an apparently mandatory

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[13] See *Gardner* v. *Florida*, 430 U. S. 349 (opinion of STEVENS, J.); *Lockett* v. *Ohio*, 438 U. S. 586. In *Lockett* THE CHIEF JUSTICE explained the rationale for requiring more reliable procedures in capital sentencing determinations:

"There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*, at 605.

See also *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (opinion of STEWART, POWELL, and STEVENS, JJ.):

"Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

[14] We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case.

death penalty statute, the preclusion of lesser included offense instructions heightens, rather than diminishes, the reliability of the guilt determination. The State argues that, because the jury is led to believe that a death sentence will automatically follow a finding of guilt,[15] it will be more likely to acquit than to convict whenever it has anything approaching a reasonable doubt. In support of this theory the State relies on the historical data described in *Woodson* v. *North Carolina*, 428 U. S., at 293 (opinion of STEWART, POWELL, and STEVENS, JJ.), which indicated that American juries have traditionally been so reluctant to impose the death penalty that they have "with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict."

The State's argument is based on a misreading of our cases striking down mandatory death penalties. In *Furman* v. *Georgia*, 408 U. S. 238, the Court held unconstitutional a Georgia statute that vested the jury with complete and unguided discretion to impose the death penalty or not as it saw fit, on the ground that such a procedure led to the "wanton" and "freakish" imposition of the penalty. *Id.*, at 310 (STEWART, J., concurring). In response to *Furman* several States enacted statutes that purported to withdraw any and all discretion from the jury with respect to the punishment decision by making the death penalty automatic on a finding of guilt. But, as the prevailing opinion noted in *Woodson* v. *North Carolina*, in so doing the States "simply papered over the problem of unguided and unchecked jury discretion." 428 U. S., at 302 (opinion of STEWART, POWELL, and STEVENS, JJ.). For, as historical evidence indicated, juries faced with a mandatory death penalty statute often

[15] The jury is not told that the judge is the final sentencing authority. Rather, the jury is instructed that it must impose the death sentence if it finds the defendant guilty and is led to believe, by implication, that its sentence will be final.

created their own sentencing discretion by distorting the fact-finding process, acquitting even a clearly guilty defendant if they felt he did not deserve to die for his crime. Because the jury was given no guidance whatsoever for determining when it should exercise this *de facto* sentencing power, the mandatory death statutes raised the same possibility that the death penalty would be imposed in an arbitrary and capricious manner as the statute held invalid in *Furman*.[16]

The Alabama statute, which was enacted after *Furman* but before *Woodson*, has many of the same flaws that made the North Carolina statute unconstitutional. Thus, the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue.

In *Jacobs* v. *State*, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U. S. 1122, Chief Justice Torbert attempted to distinguish the Alabama death statute from the North Carolina and Louisiana statutes on the ground that the unavailability of lesser included offense instructions substantially reduces the risk of jury nullification. Thus, because of their reluctance to acquit a defendant who is obviously guilty of some serious crime, juries will be unlikely to disregard their oaths and acquit a defendant who is guilty of a capital crime simply because of their abhorrence of the death penalty.

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[16] The same analysis led to the conclusion that Louisiana's death penalty statute was unconstitutional. *Roberts* v. *Louisiana*, 428 U. S. 325 (opinion of STEWART, POWELL, and STEVENS, JJ.). That case involved a mandatory death penalty statute that required the judge to give a lesser included offense instruction whether or not it was justified by the evidence. Because such a procedure "invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate," it was the equivalent of a discretionary death statute in which the jury was given complete and unreviewable discretion, unguided by any standards as to when the death penalty was appropriate. *Id.*, at 335.

However, because the death penalty is mandatory, the State argues that the jury will be especially careful to accord the defendant the full benefit of the reasonable-doubt standard. In the State's view the end result is a perfect balance between competing emotional pressures that ensures the defendant a reliable procedure, while at the same time reducing the possibility of arbitrary and capricious guilt determinations.[17]

The State's theory, however, is supported by nothing more than speculation. The 96% conviction rate achieved by prosecutors under the Alabama statute hardly supports the notion that the statute creates such a perfect equipoise.[18]

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[17] In *Gregg* v. *Georgia*, 428 U. S. 153, 199 (opinion of STEWART, POWELL, and STEVENS, JJ.), the prevailing opinion specifically rejected the argument that the new Georgia statute was unconstitutional because the availability of lesser included offense instructions made it possible that a jury might erroneously remove a defendant from consideration as a candidate for the death penalty. Under a statute like Georgia's, where guilt is determined separately from punishment, there is little risk that the jury will use its power to decide guilt to make a *de facto* punishment decision. Thus, eliminating lesser included offense instructions would not have the effect of reducing the risk of arbitrariness in the imposition of the death penalty. On the contrary, as was stated in a footnote in *Gregg*, eliminating this and other procedural safeguards that have long been accorded criminal defendants would raise serious constitutional questions. *Id.*, at 199, n. 50.

Thus, it is only in cases like this in which the preclusion of lesser included offenses is linked to a mandatory death penalty that the State could even raise the possibility that the elimination of this procedural safeguard was a permissible way to reduce the arbitrary and capricious infliction of the death penalty.

[18] Forty-eight out of the first 50 defendants tried under the Alabama statute were convicted. See Brief in Opposition in *Jacobs* v. *Alabama*, O. T. 1978, No. 78-5696, pp. 10, 35. In this case the State has argued that the reason for the high conviction rate is that prosecutors rarely indict for capital offenses except in the clearest of cases because of the risk that a failure of proof on an essential element of the crime might lead to an acquittal. Assuming that this is the reason for the high conviction rate, the statistics still do not support the hypothesis that juries will be more likely to acquit than convict in a doubtful case.

Moreover, it seems unlikely that many jurors would react in the theoretically perfect way the State suggests. As Justice Shores stated in dissent in *Jacobs* v. *State*, *supra*, at 651–652:

> "The Supreme Court of the United States did remark in *Furman*, *infra*, and again in *Woodson*, *supra*, that this nation abhorred the mandatory death sentence. . . . I suggest that, although there is no historical data to support it, most, if not all, jurors at this point in our history perhaps equally abhor setting free a defendant where the evidence establishes his guilt of a serious crime. We have no way of knowing what influence either of these factors have on a jury's deliberation, and which of these unappealing alternatives a jury opts for in a particular case is a matter of purest conjecture. We cannot know that one outweighs the other. Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience. . . ."

In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to

acquit for an equally impermissible reason—that, whatever his crime, the defendant does not deserve death.[19] In any particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

III

The State also argues that, whatever the effect of precluding lesser included offense instructions might otherwise be, there is no possibility of harm under the Alabama statute because of two additional safeguards. First, although the jury may not convict the defendant of a lesser included offense, the State argues that it may refuse to return any verdict at all in a doubtful case, thus creating a mistrial. After a mistrial, the State may reindict on the capital offense or on lesser included offenses.[20] In this case the jury was in-

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[19] The closing arguments in this case indicate that under the Alabama statute the issue of whether or not the defendant deserves the death penalty will often seem more important than the issue of whether the State has proved each and every element of the capital crime beyond a reasonable doubt. Thus, in this case both the prosecutors and defense attorneys spent a great deal of argument time on the desirability of the death penalty in general and its application to the petitioner in particular, rather than focusing on the crucial issue of whether the evidence showed that petitioner had possessed the intent necessary to convict on the capital charge.

[20] Alabama Code § 13–11–2 (c) (1975) provides:

"[I]f the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided

structed that a mistrial would be declared if it was unable to agree on a verdict or if it was unable to agree on fixing the death penalty; it was also told that, in the event of a mistrial, the defendant could be tried again. Record 743.

We are not persuaded by the State's argument that the mistrial "option" is an adequate substitute for proper instructions on lesser included offenses. It is extremely doubtful that juries will understand the full implications of a mistrial [21] or will have any confidence that their choice of the mistrial option will ultimately lead to the right result. Thus, they could have no assurance that a second trial would end in the conviction of the defendant on a lesser included offense. Moreover, invoking the mistrial option in a case in which the jury agrees that the defendant is guilty of *some* offense, though not the offense charged, would require the jurors to violate their oaths to acquit in a proper case—contrary to the State's assertions that juries should not be expected to make such lawless choices. Finally, the fact that lesser included offense instructions have traditionally been given in non-capital cases despite the availability of the mistrial "option"

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by law; however, the punishment shall not be death or life imprisonment without parole."

[21] The jury in this case could hardly have been sure of the effect of a mistrial. In his closing argument one of petitioner's attorneys told the jury that "if I can have any opportunity under any reindictment or any other way to take him [petitioner] before this bar of justice and enter a plea of guilty of murder, robbery, either one, life in prison, I'll take him." Record 689. At another point, however, petitioner's other attorney indicated that petitioner could still be punished even if he were acquitted, stating: "I submit to you if you acquit him he's still in the Etowah County Jail. I submit to you if you acquit him that he can receive his due punishment, but I say to you his due punishment is not death." *Id.*, at 709.

In his instructions to the jury the trial judge stated that, if acquitted, petitioner could not be tried "for anything he ever did to Roy Malone." And, although he explained that petitioner could be retried in the event of a mistrial, he did not elaborate on what that retrial would entail. *Id.*, at 743.

indicates that such instructions provide a necessary additional measure of protection for the defendant.

The State's second argument is that, even if a defendant is erroneously convicted, the fact that the judge has the ultimate sentencing power will ensure that he is not improperly sentenced to death. Again, we are not persuaded that sentencing by the judge compensates for the risk that the jury may return an improper verdict because of the unavailability of a "third option."

If a fully instructed jury would find the defendant guilty only of a lesser, noncapital offense, the judge would not have the opportunity to impose the death sentence. Moreover, it is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Indeed, according to statistics submitted by the State's Attorney General, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate hearing in aggravation and mitigation before he imposes sentence.[22] Under these circumstances, we are unwilling to presume that a post-trial hearing will always cor-

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[22] The State's brief in opposition to the petition for certiorari in *Jacobs* v. *Alabama*, O. T. 1978, No. 78–5696, states that of the first 45 defendants sentenced after conviction by a jury of capital offenses, 37 received the death penalty from the trial judge. See pp. 10, 35 of that brief. In his dissent in *Jacobs* v. *State*, 361 So. 2d, at 650–651, Justice Jones pointed out the practical obstacles to treating the jury's imposition of the death penalty as being purely advisory:

"[T]o leave sentence reduction in the prerogative of the trial court is to place undue pressures upon this office. Again, admittedly, a trial judge must often be the bulwark of the legal system when presented with unpopular causes and adverse public opinion. This State's recent history, however, reflects the outcry of unjustified criticism attendant with a trial judge's reduction of a sentence to life imprisonment without possibility of parole, after a jury has returned a sentence of death. Clearly, this pressure constitutes an undue compulsion on the trial judge to conform the sentence which he imposes with that previously returned by the jury." (Footnote omitted.)

rect whatever mistakes have occurred in the performance of the jury's factfinding function.

Accordingly, the judgment of the Alabama Supreme Court is

Reversed.

MR. JUSTICE BRENNAN, concurring.

Although I join the Court's opinion, I continue to believe that the death penalty is, in all circumstances, contrary to the Eighth Amendment's prohibition against imposition of cruel and unusual punishments. *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting).

MR. JUSTICE MARSHALL, concurring in the judgment.

I continue to believe that the death penalty is, under all circumstances, cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Furman* v. *Georgia*, 408 U. S. 238, 314–374 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting); *Godfrey* v. *Georgia*, 446 U. S. 420, 433–442 (1980) (MARSHALL, J., concurring in judgment). In addition, I agree with the Court that Alabama's prohibition on giving lesser included offense instructions in capital cases is unconstitutional because it substantially increases the risk of error in the factfinding process. I do not, however, join in the Court's assumption that the death penalty may ever be imposed without violating the command of the Eighth Amendment that no "cruel and unusual punishments" be imposed. *Lockett* v. *Ohio*, 438 U. S. 586, 621 (1978) (MARSHALL, J., concurring in judgment); *Bell* v. *Ohio*, 438 U. S. 637, 643–644 (1978) (MARSHALL, J., concurring in judgment). I join in the judgment of the Court.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, dissenting.

The opinion of the Court begins by stating that we granted certiorari to decide the question of whether a sentence of

death may be constitutionally imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense where the evidence would have supported such a verdict. I find the Court's treatment of this issue highly unusual, since although this question was raised in the Alabama trial court and the Alabama intermediate Court of Appeals, it was not preserved in the Supreme Court of Alabama. That court began its opinion with this language:

> "Petitioner Beck raises only one issue here:
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> "'Whether the Alabama Court of Criminal Appeals erred in its finding that the Alabama Death Penalty Statute is not in violation of Article III, Section 43, Article V, Section 124 and Amendment 38, of the 1901 Constitution of Alabama.'" 365 So. 2d 1006, 1007.

Obviously, unless the Supreme Court of Alabama was wholly in error in deciding what issue petitioner had raised there, it was obviously not a question involving the United States Constitution.

I do not believe it suffices, under the jurisdiction granted to us by the Constitution and by Congress, to brush this matter off as the Court does in its footnote 6 on the grounds that petitioner presented his claim "in some fashion" to the Supreme Court of Alabama, and that "[t]he State has never argued that this presentation was insufficient, as a matter of state law, to preserve the issue."

This is not a matter that may be stipulated or waived by any of the parties to a case decided on its merits here. Title 28 U. S. C. § 1257 provides that our certiorari jurisdiction extends only to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ."

In *Hulbert* v. *Chicago*, 202 U. S. 275, 280 (1906), this Court said:

> "It is urged that in the writ of error and petition for citation it is stated that certain rights and privileges were

> claimed under the Constitution of the United States, and that the Supreme Court of the State of Illinois decided against such rights and privileges, and, it is further urged, that the chief justice of the court allow the writ of error. This is not sufficient."

More recently, in *Street* v. *New York*, 394 U. S. 576, 582 (1969), the Court has said:

> "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts *unless the aggrieved party in this Court can affirmatively show the contrary.*" (Emphasis supplied.)

Thus it is insufficient that the State "has never argued" that a judgment under review is not that of the highest court of the State in which a judgment could be had; it will be *assumed* that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can *affirmatively* show the contrary. Here I am not convinced that such a showing has been made.

Believing, therefore, because of the proceedings in the Supreme Court of Alabama, that we do not have jurisdiction under 28 U. S. C. § 1257 to decide the question which the Court purports to decide, I dissent.

Syllabus

WALTER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79–67. Argued February 26, 1980—Decided June 20, 1980*

When an interstate shipment of several securely sealed packages containing 8-millimeter films depicting homosexual activities was mistakenly delivered by a private carrier to a third party rather than to the consignee, employees of the third party opened each of the packages, finding individual film boxes, on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents. One employee opened one or two of the boxes and attempted without success to view portions of the film by holding it up to the light. After the Federal Bureau of Investigation was notified and picked up the packages, agents viewed the films with a projector without first making any effort to obtain a warrant or to communicate with the consignor or the consignee of the shipment. Thereafter, petitioners were indicted on federal obscenity charges relating to the interstate transportation of certain of the films in the shipment, a motion to suppress and return the films was denied, and petitioners were convicted. The Court of Appeals affirmed, and rehearing was denied.

Held: The judgments are reversed. Pp. 653–660; 660–662.

Certiorari dismissed in part; 592 F. 2d 788 and 597 F. 2d 63, reversed.

MR. JUSTICE STEVENS, joined by MR. JUSTICE STEWART, concluded that even though the nature of the contents of the films was indicated by descriptive material on their individual containers, the Government's unauthorized screening of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances. Cf. *Stanley* v. *Georgia*, 394 U. S. 557, 569 (STEWART, J., concurring in result). Pp. 653–660.

(a) The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents. An officer's authority to possess a package is distinct from his authority to examine its contents, and when the contents of the package are books or other materials arguably protected by the First Amendment, and the basis

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*Together with No. 79–148, *Sanders et al.* v. *United States*, also on certiorari to the same court.

for the seizure is disapproval of the message contained therein, it is especially important that the Fourth Amendment's warrant requirement be scrupulously observed. Pp. 654–655.

(b) Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure to obtain a search warrant. Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's re-examination of the materials, the Government may not exceed the scope of the private search unless it has the right to make an independent search. Here, the private party had not actually viewed the films, and prior to the Government screening one could only draw inferences about what was on the films. Thus, the projection of the films was a significant expansion of the previous search by a private party and therefore must be characterized as a separate search, which was not supported by any exigency or by a warrant even though one could have easily been obtained. Pp. 656–657.

(c) The fact that the cartons of film boxes, which cartons were securely wrapped and had no markings indicating the character of their contents, were unexpectedly opened by a third party before the shipment was delivered to its intended consignee, thus uncovering the descriptive labels on the film boxes, does not alter the consignor's legitimate expectation of privacy in the films. The private search merely frustrated that expectation in part and did not strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection. Pp. 658–659.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, concurring in part and in the judgment, agreed that the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests even though the Government had acquired the films from a private party, but disagreed with the suggestion that it is an open question whether the Government's projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles, and even if the private parties in this action had projected the films before turning them over to the Government, the Government still would have been required to obtain a warrant for its subsequent screening of them. Pp. 660–662.

MR. JUSTICE MARSHALL concurred in the judgment.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which STEWART, J., joined. WHITE, J., filed an opinion concurring in part and in the judgment, in which BRENNAN, J., joined, *post*, p. 660. MARSHALL, J., concurred in the judgment. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 662.

W. Michael Mayock argued the cause and filed a brief for petitioner in No. 79–67. *Glenn Zell* argued the cause and filed a brief for petitioners in No. 79–148.

Elliott Schulder argued the cause for the United States in both cases. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Jerome M. Feit,* and *Patty Merkamp Stemler.*

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE STEWART joined.

Having lawfully acquired possession of a dozen cartons of motion pictures, law enforcement officers viewed several reels of 8-millimeter film on a Government projector. Labels on the individual film boxes indicated that they contained obscene pictures. The question is whether the Fourth Amendment required the agents to obtain a warrant before they screened the films.

Only a few of the bizarre facts need be recounted. On September 25, 1975, 12 large, securely sealed packages containing 871 boxes of 8-millimeter film depicting homosexual activities were shipped by private carrier from St. Petersburg, Fla., to Atlanta, Ga. The shipment was addressed to "Leggs, Inc.,"[1] but was mistakenly delivered to a substation in the suburbs of Atlanta, where "L'Eggs Products, Inc.," regularly received deliveries. Employees of the latter company opened

[1] There was no "Leggs, Inc." "Leggs" was the nickname of a woman employed by one of petitioners' companies. The packages indicated that the intended recipient would pick them up and pay for them at the carrier's terminal in Atlanta.

each of the packages, finding the individual boxes of film. They examined the boxes, on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents. One employee opened one or two of the boxes, and attempted without success to view portions of the film by holding it up to the light.[2] Shortly thereafter, they called a Federal Bureau of Investigation agent who picked up the packages on October 1, 1975.

Thereafter, without making any effort to obtain a warrant or to communicate with the consignor or the consignee of the shipment, FBI agents viewed the films with a projector. The record does not indicate exactly when they viewed the films, but at least one of them was not screened until more than two months after the FBI had taken possession of the shipment.[3]

On April 6, 1977, petitioners were indicted on obscenity charges relating to the interstate transportation of 5 of the 871 films in the shipment. A motion to suppress and return the films was denied, and petitioners were convicted on multiple counts of violating 18 U. S. C. §§ 371, 1462, and 1465. Over Judge Wisdom's dissent, the Court of Appeals for the Fifth Circuit affirmed, 592 F. 2d 788, and rehearing was denied, 597 F. 2d 63 (1979). We granted certiorari, 444 U. S. 914,[4] and now reverse.

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[2] Each reel was eight millimeters in width. Petitioner Walter informs us that, excluding three millimeters for sprocketing and one millimeter for the border, the film itself is only four millimeters wide. Brief for Petitioner in No. 79–67, p. 30, n. 8. Since the scenes depicted within the frame are necessarily even more minute, it is easy to understand why such films cannot be examined successfully with the naked eye.

[3] The FBI had meanwhile received no request from the consignee or the consignor of the films for their return, but the agents had been told by employees of L'Eggs Products, Inc., that inquiries had been made as to their whereabouts.

[4] The petition for certiorari in No. 79–67 presented 10 separate questions, and the petition in No. 79–148 presented 5 separate questions. Except

In his concurrence in *Stanley* v. *Georgia*, 394 U. S. 557, 569, MR. JUSTICE STEWART expressed the opinion that the warrantless projection of motion picture films was an unconstitutional invasion of the privacy of the owner of the films. After noting that the agents in that case were lawfully present in the defendant's home pursuant to a warrant to search for wagering paraphernalia, MR. JUSTICE STEWART wrote:

> "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection. . . . After finding them, the agents spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant.
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> "Even in the much-criticized case of *United States* v. *Rabinowitz*, 339 U. S. 56, the Court emphasized that 'exploratory searches . . . cannot be undertaken by officers with or without a warrant.' *Id.*, at 62. This record presents a bald violation of that basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.
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> "Because the films were seized in violation of the Fourth and Fourteenth Amendments, they were inadmis-

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with respect to the issues discussed in the text, we have determined that certiorari was improvidently granted. We therefore dismiss as to the other questions that have been briefed and argued. For purposes of decision, we accept the Government's argument that the delivery of the films to the FBI by a third party was not a "seizure" subject to the warrant requirement of the Fourth Amendment.

sible in evidence at the appellant's trial." *Id.*, at 571–572 (footnote omitted).

Even though the cases before us involve no invasion of the privacy of the home, and notwithstanding that the nature of the contents of these films was indicated by descriptive material on their individual containers, we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances.

It is perfectly obvious that the agents' reason for viewing the films was to determine whether their owner was guilty of a federal offense. To be sure, the labels on the film boxes gave them probable cause to believe that the films were obscene and that their shipment in interstate commerce had offended the federal criminal code. But the labels were not sufficient to support a conviction and were not mentioned in the indictment. Further investigation—that is to say, a search of the contents of the films—was necessary in order to obtain the evidence which was to be used at trial.

The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents. Ever since 1878 when Mr. Justice Field's opinion for the Court in *Ex parte Jackson*, 96 U. S. 727, established that sealed packages in the mail cannot be opened without a warrant, it has been settled that an officer's authority to possess a package is distinct from his authority to examine its contents.[5] See *Arkansas* v. *Sanders*, 442 U. S. 753, 758; *United*

[5] "In th[e] enforcement [of regulations as to what may be transported in the mails], a distinction is to be made between different kinds of mail matter,—between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and

States v. *Chadwick*, 433 U. S. 1, 10. When the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement be scrupulously observed.[6]

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sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." 96 U. S., at 732–733.

And later in his opinion, Mr. Justice Field again noted that "regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter. . . ." *Id.*, at 735.

[6] "This is the history which prompted the Court less than four years ago to remark that '[t]he use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new.' *Marcus* v. *Search Warrant*, 367 U. S. 717, at 724. 'This history was, of course, part of the intellectual matrix within which our constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.' *Id.*, at 729. As MR. JUSTICE DOUGLAS has put it, 'The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of *Entick* v. *Carrington*, [19 How. St. Tr. 1029 (1765)]. These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination

Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure to obtain a search warrant. It has, of course, been settled since *Burdeau* v. *McDowell*, 256 U. S. 465, that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully. See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 487–490. In these cases there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties. Since that examination had uncovered the labels, and since the labels established probable cause to believe the films were obscene, the Government argues that the limited private search justified an unlimited official search. That argument must fail, whether we view the official search as an expansion of the private search or as an independent search supported by its own probable cause.

When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization.[7] Consent

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but "conscience and human dignity and freedom of expression as well." *Frank* v. *Maryland*, 359 U. S. 360, 376 (dissenting opinion).

"In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." *Stanford* v. *Texas*, 379 U. S. 476, 484–485.

See also *Roaden* v. *Kentucky*, 413 U. S. 496, 501. Although there were 871 reels of film in the shipment, there were only 25 different titles. Since only five of the titles were used as a basis for prosecution, it may be presumed that the other films were not obscene.

[7] "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." *Marron* v. *United States*, 275 U. S. 192, 196.

to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers. Because "indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment," *Payton* v. *New York*, 445 U. S. 573, 583, that Amendment requires that the scope of every authorized search be particularly described.[8]

If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy. Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. In these cases, the private party had not actually viewed the films. Prior to the Government screening, one could only draw inferences about what was on the films.[9] The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained.[10]

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[8] The Warrant Clause of the Fourth Amendment expressly provides that no warrant may issue except those "particularly describing the place to be searched, and the persons or things to be seized."

[9] Since the viewing was first done by the Government when it screened the films with a projector, we have no occasion to decide whether the Government would have been required to obtain a warrant had the private party been the first to view them.

[10] The fact that the labels on the boxes established probable cause to believe the films were obscene clearly cannot excuse the failure to obtain a

The Government claims, however, that because the packages had been opened by a private party, thereby exposing the descriptive labels on the boxes, petitioners no longer had any reasonable expectation of privacy in the films, and that the warrantless screening therefore did not invade any privacy interest protected by the Fourth Amendment. But petitioners expected no one except the intended recipient either to open the 12 packages or to project the films. The 12 cartons were securely wrapped and sealed, with no labels or markings to indicate the character of their contents.[11] There is no reason why the consignor of such a shipment would have any lesser expectation of privacy than the consignor of an ordinary locked suitcase.[12] The fact that the cartons were unexpectedly

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warrant; for if probable cause dispensed with the necessity of a warrant, one would never be needed.

Contrary to the dissent, *post*, at 665–666, n. 3, there were no impracticalities in these cases that would vitiate the warrant requirement. The inability to serve a warrant on the owner of property to be searched does not make execution of the warrant unlawful. See ALI, Model Code of Pre-Arraignment Procedure § 220.3 (4) (Prop. Off. Draft 1975). Obviously, such inability does not render a warrant unnecessary under the Fourth Amendment. Nor is it clear in these cases that it would have been impossible to serve petitioners with a search warrant had the FBI made any effort to find them prior to screening the films. See n. 3, *supra*.

[11] For the same reason, one may not deem petitioners to have consented to the screening merely because the labels on the unexposed boxes were explicit.

Nor can petitioners' failure to make a more prompt claim to the Government for return of the films be fairly regarded as an abandonment of their interest in preserving the privacy of the shipment. As subsequent events have demonstrated, such a request could reasonably be expected to precipitate criminal proceedings. We cannot equate an unwillingness to invite a criminal prosecution with a voluntary abandonment of any interest in the contents of the cartons. In any event, the record in these cases does indicate that the defendants made a number of attempts to locate the films before they were examined by the FBI agents.

[12] The consignor's expectation of privacy in the contents of a carton delivered to a private carrier must be measured by the condition of the package at the time it was shipped unless there is reason to assume that

opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy. The private search merely frustrated that expectation in part.[13] It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection.[14] Since the additional search conducted by the FBI—the screening of the films—was not supported by any justification, it violated that Amendment.

We therefore conclude that the rationale of MR. JUSTICE STEWART's concurrence in *Stanley* v. *Georgia*, 394 U. S. 557,

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it would be opened before it arrived at its destination. Thus, for example, if a gun case is delivered to a carrier, there could then be no expectation that the contents would remain private, cf. *Arkansas* v. *Sanders*, 442 U. S. 753, 764–765, n. 13; but if the gun case were enclosed in a locked suitcase, the shipper would surely expect that the privacy of its contents would be respected.

The dissent asserts, *post*, at 665, that "[a]ny subjective expectation of privacy on the part of petitioners was undone . . . by their own actions and the private search." But it is difficult to understand how petitioners' subjective expectation of privacy could have been altered in any way by subsequent events of which they were obviously unaware.

[13] A partial invasion of privacy cannot automatically justify a total invasion. As Learned Hand noted in a somewhat different context: "It is true that when one has been arrested in his home or his office, his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage, even though both are customarily grouped together as parts of the 'right of privacy.'" *United States* v. *Rabinowitz*, 176 F. 2d 732, 735 (CA2 1949), rev'd, 339 U. S. 56. Judge Hand's view was ultimately vindicated in *Chimel* v. *California*, 395 U. S. 752, 768, which specifically disapproved this Court's decision in *Rabinowitz*. See also MR. JUSTICE STEWART's opinion concurring in the result in *Stanley* v. *Georgia*, 394 U. S. 557, 571–572, quoted *supra*, at 653–654.

[14] It is arguable that a third party's inspection of the contents of "private books, papers, memoranda, etc." could be so complete that there would be no additional search by the FBI when it re-examines the materials. Cf. *Burdeau* v. *McDowell*, 256 U. S. 465, 470. But this is not such a case, because it was clearly necessary for the FBI to screen the films, which the private party had not done, in order to obtain the evidence needed to accomplish its law enforcement objectives.

is applicable to these cases and that it requires that the judgments of the Court of Appeals be reversed.

It is so ordered.

MR. JUSTICE MARSHALL concurs in the judgment.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, concurring in part and concurring in the judgment.

I agree with MR. JUSTICE STEVENS that the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party.[1] I write separately, however, because I disagree with MR. JUSTICE STEVENS' suggestion that it is an open question whether the Government's projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government, *ante*, at 657, n. 9. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles. Nor does it follow from our recognition in *Burdeau* v. *McDowell*, 256 U. S. 465 (1921), and *Coolidge* v. *New Hampshire*, 403 U. S. 443, 487–490 (1971), that the Fourth Amendment proscribes only governmental action.[2]

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[1] Although MR. JUSTICE STEVENS' opinion refers to the films as having been "lawfully acquired" by the Government, *ante*, at 651, 654, 656, I note that he does not reach the question whether the Government's acquisition of the films was a "seizure" subject to the warrant requirement of the Fourth Amendment, *ante*, at 653, n. 4, a question on which the Court of Appeals was divided. 592 F. 2d 788, 792–793, 800–802 (CA5 1979). Likewise, I do not address this question.

[2] Neither *Burdeau* v. *McDowell* nor *Coolidge* v. *New Hampshire* supports the proposition that private searches insulate subsequent governmental searches from Fourth Amendment scrutiny. In *Burdeau* the Court held that the actions of a private party in illegally seizing evidence will not be attributed to the Government for Fourth Amendment purposes

I agree with MR. JUSTICE STEVENS that there was "nothing wrongful" about the Government's examination of the contents of the packages that had been opened by private parties. When the private parties turned the films over to the Government, the packages already had been opened, and the Government saw no more than what was exposed to plain view. No Fourth Amendment interest was implicated by this conduct because the opening of the packages cannot be attributed to the Government and considered a governmental search.[3] As the Court noted in *Coolidge* v. *New Hampshire, supra,* at 489, where a private party produced evidence for government inspection, "it was not incumbent on the police to stop her or avert their eyes."

This does not mean, however, that the Government subsequently may conduct the same kind of search that private parties have conducted without implicating Fourth Amendment interests. The contrary view would permit Government agents to conduct warrantless searches of personal property whenever probable cause exists as a result of a prior private search. We have previously held, however, that police must obtain a warrant before searching a suspect's luggage even

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when the private party turns the evidence over to the Government. The Court noted that because "no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, . . . [i]t is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another." 256 U. S., at 475. Similarly, in *Coolidge* v. *New Hampshire,* the Court held that a wife's voluntary action in turning over to police her husband's guns and clothing did not constitute a search and seizure by the government. 403 U. S., at 487–490.

[3] Because the private party's opening of the packages exposed their contents to plain view and made it unnecessary for the FBI agents to open the packages, there was no governmental search when the FBI viewed their contents. Except in such circumstances, I do not understand how a third party's inspection of a package's contents "could be so complete that there would be no additional search by the FBI when it re-examines the materials," *ante,* at 659, n. 14.

if they have probable cause to believe that it contains contraband. *Arkansas* v. *Sanders*, 442 U. S. 753 (1979); *United States* v. *Chadwick*, 433 U. S. 1 (1977). The fact that such probable cause may be the product of a private search would not alter the need to comply with the warrant requirement. Thus, if the private parties in these cases had projected the films before turning them over to the Government, the Government still would have been required to obtain a warrant for its subsequent screening of them. As MR. JUSTICE STEVENS recognizes, petitioners possessed a legitimate expectation of privacy in the films, and this expectation was infringed by the Government's unauthorized screening of them. Unlike the opening of the packages that destroyed their privacy by exposing their contents to the plain view of subsequent observers, a private screening of the films would not have destroyed petitioners' privacy interest in them. Thus the Government's subsequent screening of the films constituted an independent, governmental search that would have infringed petitioners' Fourth Amendment interests without regard to any previous screening by private parties.

I therefore concur in part and in the judgment.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

The Court at least preserves the integrity of the rule specifically recognized long ago in *Burdeau* v. *McDowell*, 256 U. S. 465 (1921). That rule is to the effect that the Fourth Amendment proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.

I disagree with MR. JUSTICE STEVENS' opinion's parsing of the cases' "bizarre facts" see *ante*, at 651, to reach a result that

the Government's screening of the films in question was an additional and unconstitutional search. The facts, indeed unusual, convince me that, by the time the FBI received the films, these petitioners had no remaining expectation of privacy in their contents.

The cartons in which the films were contained were shipped by petitioners via Greyhound, a private carrier, to a fictitious addressee, and with the shipper fictitiously identified. The private examination of the packages by employees of L'Eggs Products, Inc., whom Greyhound innocently asked to pick up the packages, revealed that they contained films and that the films were of an explicit sexual nature. This was obvious from the drawings and labels on the containers, drawings that MR. JUSTICE STEVENS' opinion describes as "suggestive," and descriptions he refers to as "explicit." *Ante*, at 652. The containers thus clearly revealed the nature of their contents. See 592 F. 2d 788, 793–794, and n. 5 (CA5 1979). The opinion acknowledges that "there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties." *Ante*, at 656. But in finding that the FBI's "projection of the films was a significant expansion of the search that had been conducted previously by a private party," *ante*, at 657, the opinion seems conveniently to have overlooked the fact that the FBI received the film cartons *after* they had been opened, and *after* the films' labels had been exposed to the public.

I agree with the conclusion reached by the Court of Appeals' majority:

> "Under these circumstances, since the L'Eggs employees so fully ascertained the nature of the films before contacting the authorities, we find that the FBI's subsequent viewing of the movies on a projector did not 'change the nature of the search' and was not an additional search

subject to the warrant requirement." 592 F. 2d, at 793–794.[1]

The STEVENS opinion's contrary conclusion apparently is based on the view that petitioners had a legitimate expectation of privacy in the contents of these films, which they had protected by sealing them securely in the proverbial "plain brown wrapper," that was "frustrated" only "in part," *ante*, at 659, by the earlier private search.[2] But it seems to me that the opinion ignores the fact that the partial frustration of petitioners' subjective expectation of privacy was directly attributable to their own actions. The District Court described it well when it ruled:

> "And it seems to me, under the circumstances of this case, that shipping or causing or suffering to be shipped by a common carrier, namely, Greyhound Bus Lines, with a fictitious name given for the shipper as well as the fictitious name given for the consignee or addressee,

[1] The Court of Appeals noted, 592 F. 2d, at 794, n. 6, and placed some reliance on, the observations of Judge William H. Webster in his dissenting opinion in *United States* v. *Haes*, 551 F. 2d 767 (CA8 1977):

"Can it be seriously argued that an agent receiving a suspected book or magazine from a freight carrier employee could not reasonably open the publication and peruse its pages to determine whether its contents offended the law? . . . Would a government agent who used a magnifying glass or other mechanical aid to identify an object be vulnerable to a claim of an unreasonable search independent of the lawful private search which produced the object? I think clearly not.

"The film in this case was not a means of concealing something else. In looking at the film through a projector, the agents did no more than view the motion pictures in the manner in which they were intended to be viewed." *Id.*, at 772–773 (footnote omitted).

The present cases are even stronger ones for recognizing the legality of the Government's projection of the film than the case Judge Webster posed. When the FBI screened these films, they already were aware of the nature of their contents.

[2] In contrast, I am at a loss to explain the conclusion stated in MR. JUSTICE WHITE's opinion, *ante*, at 662, that even "a private screening of the films would not have destroyed petitioners' privacy interest in them."

amounts to a relinquishment or abandonment of any reasonable expectation of privacy.

"Or, stated another way, it seems to me that it was reasonably foreseeable in those circumstances that what actually occurred would occur. That is to say, that there was substantial likelihood that the material would be misdelivered and fall into the hands of some third party, as actually happened in this case, where it would be opened and its privacy, if it had any, invaded." App. 37–38, quoted in part in 592 F. 2d, at 791.

Given the facts, and the STEVENS opinion's conclusions based thereon, I cannot help but wonder at the concession that "if a gun case is delivered to a carrier, there could then be no expectation that the contents would remain private." *Ante*, at 659, n. 12. The films in question were in a state no different from MR. JUSTICE STEVENS' hypothetical gun case when they reached the FBI. Their contents were obvious from "the condition of the package," *ante*, at 658, n. 12, and those contents had been exposed as a result of a purely private search that did not implicate the Fourth Amendment. Moreover, it was petitioners' own actions that made it likely that such a private search would occur. The opinion fails to explain, at least to my satisfaction, why petitioners' subjective expectation of privacy at the time they shipped the films, rather than at the time the films came into possession of the FBI (with the resulting protection of constitutional safeguards from unreasonable governmental action), controls this inquiry. Any subjective expectation of privacy on the part of petitioners was undone by that time by their own actions and the private search. In any event, it was abandoned by their shunning the property, under the circumstances of these cases, for over 20 months.[3]

[3] All this is reinforced by the impracticalities the Court would impose upon the FBI in these cases. The STEVENS opinion and the WHITE opinion both insist that a warrant should have been obtained before any of the

We tend occasionally to strain credulity and to spin the thread of argument so thin that we depart from the commonsense approach to an obvious fact situation. It seems to me to be beyond the limits of sound precedent to exclude the evidence of petitioners' crimes in the face of the "bizarre" developments that transpired here, developments that petitioners brought upon themselves. But the cases are strange and particular ones. The margin for reversal is narrow, and I rest assured that sound constitutional precepts will survive the result the Court reaches today.

I would affirm the judgments of the Court of Appeals.

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films were viewed. One might inquire, on whom would the warrant be served? Surely, not on L'Eggs Products, Inc., which no longer had possession and wanted only to wish these films a speedy good riddance. And surely not on the shippers, who purposefully had concealed their identities.

UNITED STATES *v.* RADDATZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79–8. Argued February 25, 1980—Decided June 23, 1980

Prior to his trial on federal criminal charges, respondent moved to suppress certain incriminating statements he had made to police officers and federal agents. Over objections, the District Court referred the motion to a Magistrate for an evidentiary hearing pursuant to a provision of the Federal Magistrates Act, 28 U. S. C. § 636 (b) (1), which authorizes a district court to refer such a motion to a magistrate and thereafter to determine and decide such motion based on the record developed before the magistrate, including the magistrate's proposed findings of fact and recommendations. Section 636 (b) (1) also provides that the judge shall make a "de novo determination" of those portions of the magistrate's report, findings, or recommendations to which objection is made, and that the judge may accept, reject, or modify, in whole or in part, the magistrate's findings or recommendations; alternatively the judge may receive further evidence or recommit the matter to the magistrate with instructions. Based on his view of the credibility of the testimony at the hearing on respondent's motion, the Magistrate found that respondent had knowingly, intelligently, and voluntarily made the inculpatory statements and recommended that the motion to suppress be denied. Over respondent's objections to the Magistrate's report, the District Court accepted the recommendation and denied the motion to suppress, stating that it had considered the transcript of the Magistrate's hearing, the parties' proposed findings of fact, conclusions of law, and supporting memoranda, the Magistrate's recommendation, and oral argument of counsel. Respondent was then tried and convicted, but the Court of Appeals reversed, holding, *inter alia*, that respondent had been deprived of due process by the District Court's failure personally to hear the controverted testimony on the motion to suppress.

Held:

1. Under the statute—which calls for "de novo determination," not a *de novo* hearing—the District Court was not required to rehear the testimony on which the Magistrate based his findings and recommendations in order to make an independent evaluation of credibility. The legislative history discloses that Congress purposefully used the word

determination rather than *hearing*, believing that Art. III was satisfied if the ultimate adjudicatory determination was reserved to the Art. III officer, and that Congress intended to permit whatever reliance the judge, in the exercise of sound judicial discretion, chose to place on the magistrate's proposed findings and recommendations. Pp. 673–676.

2. The statute strikes the proper balance between the demands of due process under the Fifth Amendment and the constraints of Art. III. Pp. 677–684.

(a) The nature of the issues presented and the interests implicated in a motion to suppress evidence do not require, as a matter of due process, that the district judge must actually hear the challenged testimony. While the resolution of a suppression motion may determine the outcome of the case, the interests underlying a voluntariness hearing do not coincide with the criminal law objective of determining guilt or innocence, but are of a lesser magnitude than those in the criminal trial itself. The due process rights claimed here are adequately protected by the statute, under which the district judge alone acts as the ultimate decisionmaker, with the broad discretion to accept, reject, or modify the magistrate's proposed findings, or to hear the witnesses live to resolve conflicting credibility claims. The statutory scheme also includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the witnesses itself. Pp. 677–681.

(b) Although the statute permits the district court to give the magistrate's proposed findings of fact and recommendations such weight as their merit commands and the sound discretion of the judge warrants, that delegation does not violate Art. III so long as the ultimate decision is made by the district court. Congress has not sought to delegate the task of rendering a final decision on a suppression motion to a non-Art. III officer, but instead has made clear that the district court has plenary discretion whether to authorize a magistrate to hold an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the court, the entire process thereafter taking place under the court's total control and jurisdiction. Pp. 681–683.

592 F. 2d 976, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 684. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 686. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 687. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 694.

Andrew J. Levander argued the cause *pro hac vice* for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann,* and *Patty Merkamp Stemler.*

Joan B. Gottschall, by appointment of the Court, 444 U. S. 923, argued the cause for respondent. With her on the brief was *Terence F. MacCarthy.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 444 U. S. 824, to resolve the constitutionality of a provision of the Federal Magistrates Act, 28 U. S. C. § 636 (b)(1)(B), which permits a district court to refer to a magistrate a motion to suppress evidence and authorizes the district court to determine and decide such motion based on the record developed before a magistrate, including the magistrate's proposed findings of fact and recommendations.

I

Respondent Raddatz was indicted on March 31, 1977, in the Northern District of Illinois for unlawfully receiving a firearm in violation of 18 U. S. C. § 922 (h). Prior to trial, respondent moved to suppress certain incriminating statements he had made to police officers and to agents of the Bureau of Alcohol, Tobacco, and Firearms. Over his objections, the District Court referred the motion to a Magistrate for an evidentiary hearing pursuant to the Federal Magistrates Act, 28 U. S. C. § 636 (b)(1)(B).

The evidence received at the suppression hearing disclosed that on August 8, 1976, two police officers responded to a report of a crime in progress. When they arrived at the scene, they observed respondent standing next to one Jimmy Baston, who was lying on the street, bleeding from the head.

**George F. Galland, Jr.,* filed a brief for the Chicago Council of Lawyers as *amicus curiae* urging affirmance.

Respondent was placed under arrest for illegal use of a weapon and was given *Miranda* warnings. The arresting officers testified that respondent explained at the time of his arrest and after the warning that he had been fighting with Baston over a family dispute and had brought the gun with him in case any of Baston's friends tried to interfere.

In due course, state charges were filed against respondent. One month later, on November 19, 1976, Agents Russell and McCulloch of the Bureau of Alcohol, Tobacco, and Firearms interviewed respondent at his home. According to their testimony at the suppression hearing, the agents had been informed by state officials that a state firearms charge was pending against respondent. The agents questioned respondent about the gun found in his possession at the time he was arrested because it had at one time been owned by an out-of-state man who had been slain in an unsolved homicide. At this interview, respondent gave a different version of the events, stating that he had seized the gun from Baston during their August 8 fight and that he did not know where Baston had obtained a gun. The agents asked respondent to help them locate Baston and told him they would inform the United States Attorney of his cooperation if he were subsequently prosecuted.

Respondent's testimony before the Magistrate concerning the November 19 interview varied from that of the federal agents. According to his testimony, he was informed that he would shortly be indicted for violations of federal firearms laws, but that if he agreed to cooperate, "somebody would talk to the prosecutor, and it would be dismissed." He also testified that he was told that if he did not agree to help, he could find himself "going to the Federal penitentiary for a long time."

On January 12, 1977, respondent telephoned the agents and requested a meeting. At this interview, he retracted his November 19 version and stated that he had not taken the gun from Baston, but had obtained it from his half-brother.

He testified at the suppression hearing that he made the incriminating statements at the January 12 meeting only after first obtaining confirmation from the agents of their November 19 promise that the indictment would be dismissed if he cooperated. The agents testified that no such promise was ever made to respondent, either on November 19 or on January 12. They testified that at the January 12 meeting respondent agreed to act as an informant and that they gave him $10 at that time to assist him in gathering information.

A final meeting occurred on January 14, 1977. Respondent returned to the local offices of the Bureau of Alcohol, Tobacco, and Firearms, accompanied by his wife and children. He was informed by Agent McCulloch that his case had been referred to the United States Attorney for prosecution. The agents again discussed with him the possibility of his becoming an informant, and repeated their promise that any cooperation would be brought to the attention of the United States Attorney. Agent McCulloch gave respondent $50 to pay expenses of acquiring information.

II

The focus of respondent's legal argument at the suppression hearing was that under *Malloy* v. *Hogan*, 378 U. S. 1, 7 (1964), and *Bram* v. *United States*, 168 U. S. 532, 542–543 (1897), his confession was not freely and voluntarily given. He contended that he had been induced to utter the incriminating statements through a promise of immunity and sought to demonstrate a course of conduct on the part of the agents supportive of such a promise.

In his report and findings, the Magistrate recommended that the motion to suppress the statements made on August 8, November 19, and January 12 be denied. He made findings that respondent had knowingly, intelligently, and voluntarily made inculpatory statements on all three occasions. Moreover, the Magistrate specifically stated: "I find the testimony of the Alcohol, Tobacco and Firearms Agent more credi-

ble . . . ; I find that Federal agents never advised [respondent] that charges against him would be dismissed, if he cooperated." App. to Pet. for Cert. 41a. The evidence before the Magistrate showed that respondent had altered his version of events on several occasions.

Respondent filed objections to the Magistrate's report. In rendering its decision, the District Court stated that it considered the transcript of the hearing before the Magistrate on the motion to suppress, the parties' proposed findings of fact, conclusions of law, and supporting memoranda, and that it read the recommendation of the Magistrate and heard oral argument of counsel. Finding "that the three statements given by the defendant and sought to be suppressed were made voluntarily," the District Court accepted the recommendation of the Magistrate and denied the motion to suppress.

By agreement of the parties, the court tried respondent on the basis of the transcript of the suppression hearing, and stipulations that the firearm had been manufactured in Florida and that respondent had been convicted of eight felonies. He was found guilty and sentenced to six months' imprisonment to be followed by four and one-half years on probation.

The Court of Appeals reversed. 592 F. 2d 976. It first rejected the statutory arguments, holding that the District Court had the power to refer to a magistrate the motion to suppress and did not abuse its discretion under the statute in deciding the issue without hearing live testimony of disputed questions of fact. Turning to the constitutional issues, the court held that the referral provisions of the Federal Magistrates Act, 28 U. S. C. § 636 (b)(1)(B), did not violate Art. III of the Constitution because the statute required the District Court to make a *de novo* determination of any disputed portion of the Magistrate's proposed findings and recommendations. However, the Court of Appeals held that respondent had been deprived of due process by the failure of the District Court personally to hear the controverted testimony. Where

credibility is crucial to the outcome, "the district court cannot constitutionally exercise its discretion to refuse to hold a hearing on contested issues of fact in a criminal case." 592 F. 2d, at 986. The District Court was directed to hold a new hearing.

III

We first address respondent's contention that under the statute, the District Court was required to rehear the testimony on which the Magistrate based his findings and recommendations in order to make an independent evaluation of credibility. The relevant statutory provisions authorizing a district court to refer matters to a magistrate and establishing the mode of review of the magistrate's actions are in 28 U. S. C. § 636 (b)(1). In § 636 (b)(1)(A), Congress provided that a district court judge could designate a magistrate to "hear and determine" any pretrial matter pending before the court, except certain "dispositive" motions. Review by the district court of the magistrate's determination of these nondispositive motions is on a "clearly erroneous or contrary to law" standard.

Certain "dispositive" motions, including a "motion . . . to suppress evidence in a criminal case," are covered by § 636 (b)(1)(B). As to these "dispositive" motions, the district judge may "designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court of [the] motion." However, the magistrate has no authority to make a final and binding disposition. Within 10 days after the magistrate files his proposed findings and recommendations, any party may file objections. The statute then provides:

> "A judge of the court shall make a de novo *determination* of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole

> or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions." § 636 (b)(1) (emphasis added).

It should be clear that on these dispositive motions, the statute calls for a *de novo* determination, not a *de novo* hearing. We find nothing in the legislative history of the statute to support the contention that the judge is required to rehear the contested testimony in order to carry out the statutory command to make the required "determination."[1] Congress enacted the present version of § 636 (b) as part of the 1976 amendments to the Federal Magistrates Act in response to this Court's decision in *Wingo* v. *Wedding*, 418 U. S. 461 (1974). *Wingo* held that as a matter of statutory construction, the 1968 Magistrates Act did not authorize magistrates to hold evidentiary hearings in federal habeas corpus cases. Congress amended the Act "in order to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court." S. Rep. No. 94–625, p. 1 (1976) (hereinafter S. Rep.); H. R. Rep. No. 94–1609, p. 2 (1976) (hereinafter H. R. Rep.).

The bill as reported out of the Senate Judiciary Committee did not include the language requiring the district court to make a *de novo* determination.[2] Rather, it included only the

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[1] Before the Court of Appeals, respondent apparently conceded that the statute permits the procedures employed here. His statutory arguments in the Court of Appeals were that the reference was invalid because not made pursuant to required enabling rules and that the Court of Appeals should exercise its supervisory powers to prohibit the procedure employed. That court rejected both arguments, and he has pursued neither before this Court.

[2] As originally introduced in the Senate, the bill provided that upon request by a party to a proceeding before a magistrate, the district "court shall *hear* de novo those portions of the report or specific proposed findings of fact or conclusions of law to which objection is made." S. 1283, 94th

language permitting the district court to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Yet the Senate Report which accompanied the bill emphasized that the purpose of the bill's language was to vest "ultimate adjudicatory power over dispositive motions" in the district court while granting the "widest discretion" on how to treat the recommendations of the magistrate. S. Rep., at 10.

The House Judiciary Committee added to the Senate bill the present language of the statute, providing that the judge shall make a "de novo determination" of contested portions of the magistrate's report upon objection by any party. According to the House Report, "[t]he amendment states expressly what the Senate implied: i. e. that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party." The Report goes on to state, quite explicitly, what was intended by "de novo determination":

> "The use of the words 'de novo determination' *is not intended to require the judge to actually conduct a new hearing* on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings." H. R. Rep., at 3.

Cong., 1st Sess. (1975) (emphasis added). As reported out of the Senate Judiciary Committee, however, this language, including the word "hear," was deleted.

Further evidence that Congress did not intend to require the district court to rehear the witnesses is provided in the House Committee Report's express adoption of the Ninth Circuit's procedures for district court review of a magistrate's credibility recommendations as announced in *Campbell* v. *United States District Court for the Northern District of California*, 501 F. 2d 196, cert. denied, 419 U. S. 879 (1974). There, in language quoted in the Committee Report, the court had stated: " 'If [the district court] finds there is a problem as to the credibility of a witness or witnesses or for other good reasons, *it may, in the exercise of its discretion,* call and hear the testimony of a witness or witnesses in an adversary proceeding. It is not required to hear any witness and not required to hold a *de novo* hearing of the case.' " H. R. Rep., at 3–4 (emphasis added), quoting 501 F. 2d, at 206.[3]

Congressional intent, therefore, is unmistakable. Congress focused on the potential for Art. III constraints in permitting a magistrate to make decisions on dispositive motions. See S. Rep., at 6; H. R. Rep., at 8. The legislative history discloses that Congress purposefully used the word *determination* rather than *hearing*, believing that Art. III was satisfied if the ultimate adjudicatory determination was reserved to the district court judge. And, in providing for a "de novo determination" rather than *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations. See *Mathews* v. *Weber*, 423 U. S. 261, 275 (1976).

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[3] We conclude that to construe § 636 (b)(1) to require the district court to conduct a second hearing whenever either party objected to the magistrate's credibility findings would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts. We cannot "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 489 (1947).

IV

Having rejected respondent's statutory argument, we turn to his constitutional challenge. He contends that the review procedures established by § 636 (b)(1) permitting the district court judge to make a *de novo* determination of contested credibility assessments without personally hearing the live testimony, violate the Due Process Clause of the Fifth Amendment and Art. III of the United States Constitution.

A

The guarantees of due process call for a "hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). The issue before us, therefore, is whether the nature of the issues presented and the interests implicated in a motion to suppress evidence require that the district court judge must actually hear the challenged testimony. The core of respondent's challenge to the statute is that "[t]he one who decides must hear." *Morgan* v. *United States*, 298 U. S. 468, 481 (1936). Here, he contends, only the magistrate "hears," but the district court is permitted to "decide" by reviewing the record compiled before the magistrate and making a final determination.

In *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), we emphasized that three factors should be considered in determining whether the flexible concepts of due process have been satisfied: (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve. In providing the fullest measure of due process protection, the Court of Appeals stressed that in this particular case the success or failure of the motion to suppress would, as a practical matter, determine the outcome of the prosecution.

Of course, the resolution of a suppression motion can and

often does determine the outcome of the case; this may be true of various pretrial motions. We have repeatedly pointed out, however, that the interests underlying a voluntariness hearing do not coincide with the criminal law objective of determining guilt or innocence.[4] See, *e. g.*, *United States* v. *Janis*, 428 U. S. 433, 453–454 (1976); *United States* v. *Peltier*, 422 U. S. 531, 535–536, 538–539 (1975); *Rogers* v. *Richmond*, 365 U. S. 534, 540–544 (1961). In *Lego* v. *Twomey*, 404 U. S. 477 (1972), we considered whether the prosecution was required to prove beyond a reasonable doubt that a confession was voluntary. In holding that a preponderance of the evidence was sufficient, we stated that "the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts." *Id.*, at 486. Accord, *Jackson* v. *Denno*, 378 U. S. 368, 384–385 (1964), holding that the "reliability of a confession has nothing to do with its voluntariness." A defendant who has not prevailed at the suppression hearing remains free to present evidence and argue to—and may persuade—the jury that the confession was not reliable and therefore should be disregarded.[5] See 18 U. S. C. § 3501 (a).[6]

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[4] Under the Fifth Amendment, a criminal defendant may not be compelled to testify against himself. In that sense, the exclusion of involuntary confessions derives from the Amendment itself. *United States* v. *Janis*, 428 U. S. 433, 443 (1976).

[5] *Lego* v. *Twomey*, 404 U. S. 477 (1972), also rejected the argument that because of the high value society places on the constitutional right to be free from compulsory self-incrimination, due process requires proof of voluntariness beyond a reasonable doubt. This Court found no indication that federal rights would suffer from determining *admissibility* by a preponderance of the evidence.

[6] Nothing in the Magistrates Act or other statute precludes renewal at trial of a motion to suppress evidence even though such motion was denied before trial. A district court's authority to consider anew a suppression motion previously denied is within its sound judicial discretion. See generally *Gouled* v. *United States*, 255 U. S. 298, 312 (1921); *Rouse* v. *United States*, 123 U. S. App. D. C. 348, 359 F. 2d 1014 (1966).

This Court on other occasions has noted that the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial. *United States* v. *Matlock*, 415 U. S. 164, 172–174 (1974); *Brinegar* v. *United States*, 338 U. S. 160, 172–174 (1949); Fed. Rules Evid. 104 (a), 1101 (d)(1). Furthermore, although the Due Process Clause has been held to require the Government to disclose the identity of an informant at trial, provided the identity is shown to be relevant and helpful to the defense, *Roviaro* v. *United States*, 353 U. S. 53, 60–61 (1957), it has never been held to require the disclosure of an informant's identity at a suppression hearing. *McCray* v. *Illinois*, 386 U. S. 300 (1967). We conclude that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself.

To be sure, courts must always be sensitive to the problems of making credibility determinations on the cold record. More than 100 years ago, Lord Coleridge stated the view of the Privy Council that a retrial should not be conducted by reading the notes of the witnesses' prior testimony:

> "The most careful note must often fail to convey the evidence fully in some of its most important elements. . . . It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; . . . the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it." *Queen* v. *Bertrand*, 4 Moo. P. C. N. S. 460, 481, 16 Eng. Rep. 391, 399 (1867).

This admonition was made with reference to an appellate court's review of a *nisi prius* judge in a trial on the merits;

here we are dealing with a situation more comparable to a special master's findings or actions of an administrative tribunal on findings of a hearing officer.

The Court of Appeals rejected an analogy to administrative agency cases because of its view that the interest inherent in a suppression motion was often the equivalent, as a practical matter, of the trial itself. Our view of the due process demands of a motion to suppress evidence makes those agency cases relevant, although to be sure we do not suggest that the interests inherent in administrative adjudications are always equivalent to those implicated in a constitutional challenge to the admissibility of evidence in a criminal case. Generally, the ultimate factfinder in administrative proceedings is a commission or board, and such trier has not heard the witnesses testify. See, *e. g.*, 5 U. S. C. § 557 (general rule under the Administrative Procedure Act); 29 U. S. C. § 160 (c) (National Labor Relations Board); 33 U. S. C. § 921 (b)(3) (Benefits Review Board); 17 CFR § 207.17 (g)(2) (1979) (Securities and Exchange Commission). While the commission or board—or an administrator—may defer to the findings of a hearing officer, that is not compelled. See, *e. g.*, *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951); *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 350–351 (1938); *Morgan* v. *United States*, 298 U. S. 468 (1936); *Utica Mutual Ins. Co.* v. *Vincent*, 375 F. 2d 129, 132 (CA2) (Friendly, J.), cert. denied, 389 U. S. 839 (1967).

We conclude that the due process rights claimed here are adequately protected by § 636 (b)(1). While the district court judge alone acts as the ultimate decisionmaker, the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings. That broad discretion includes hearing the witnesses live to resolve conflicting credibility claims. Finally, we conclude that the statutory scheme includes sufficient procedures to alert the

district court whether to exercise its discretion to conduct a hearing and view the witnesses itself.[7]

B

In passing the 1976 amendments to the Federal Magistrates Act, Congress was alert to Art. III values concerning the vesting of decisionmaking power in magistrates.[8] Accordingly, Congress made clear that the district court has plenary discretion whether to authorize a magistrate to hold an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the district court. Thereafter, the entire process takes place under the district court's total control and jurisdiction.

We need not decide whether, as suggested by the Government, Congress could constitutionally have delegated the task of rendering a final decision on a suppression motion to a non-Art. III officer. See *Palmore* v. *United States*, 411 U. S. 389 (1973). Congress has not sought to make any such delegation. Rather, Congress has provided that the magistrate's

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[7] Neither the statute nor its legislative history reveals any specific consideration of the situation where a district judge after reviewing the record in the process of making a *de novo* "determination" has doubts concerning the credibility findings of the magistrate. The issue is not before us, but we assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach.

[8] The Committee Reports noted several instances prior to the 1976 amendments where Congress had vested in officers of the court, other than the judge, the power to exercise discretion in performing an adjudicatory function, "subject always to ultimate review by a judge of the court," citing 11 U. S. C. § 67 (c) (reference to bankruptcy referee) and 28 U. S. C. § 1920 (power of clerk of court to tax costs). By analogy, Congress reasoned that permitting the exercise of an adjudicatory function by a magistrate, subject to ultimate review by the district court, would also pass constitutional muster. S. Rep., at 6; H. R. Rep., at 8.

proposed findings and recommendations shall be subjected to a *de novo* determination "by the judge who . . . then exercise[s] the ultimate authority to issue an appropriate order." S. Rep., at 3. Moreover, "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge." *Mathews* v. *Weber*, 423 U. S., at 271.

On his Art. III claim, *Crowell* v. *Benson*, 285 U. S. 22 (1932), and its progeny offer little comfort to respondent.[9] There, the Court stated that "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Id.*, at 60. See also *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922).[10] While stating that "the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it," 285 U. S., at 64, the Court pointedly noted a "distinction of controlling importance" between records formed before administrative agencies and those compiled by officers of the court such as masters in chancery or commissioners in admiralty where the proceeding is "constantly subject to the court's control." We view the statutory scheme here as rendering a magistrate's recommendations

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[9] In *Crowell*, in reviewing the constitutionality of the delegation of fact-finding to administrative officers to consider claims under the Longshoremen's and Harbor Workers' Compensation Act, the Court was concerned that Congress could not reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. It stated that unless the injuries to which the Act relates occurred upon the navigable waters of the United States, they would fall outside that jurisdiction. 285 U. S., at 55.

[10] The *Crowell* Court rejected a wholesale attack on any delegation of factfinding to the administrative tribunal. It noted that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Id.*, at 51–52.

more analogous to a master or a commissioner than to an administrative agency for Art. III purposes.[11]

Moreover, four years later, in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38 (1936), Mr. Chief Justice Hughes substantially cut back on the Court's *Crowell* holding, which he had authored, and on which respondent relies. The question there was whether administrative rate regulations were unconstitutionally confiscatory. While reaffirming his statement that administrative agencies cannot finally determine "constitutional facts," Mr. Chief Justice Hughes noted:

> "But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings [by an administrative body] upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination." 298 U. S., at 53.

See also *Estep* v. *United States*, 327 U. S. 114, 122–123 (1946). Thus, although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations "such weight as [their] merit commands and the sound discretion of the judge warrants," *Mathews* v. *Weber*, *supra*, at 275, that delegation does not violate Art. III so long as the ultimate decision is made by the district court.

We conclude that the statute strikes the proper balance

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[11] In exercising our original jurisdiction under Art. III, we appoint special masters who may be either Art. III judges or members of the Bar; the role of the master is, for these purposes, analogous to that of a magistrate. The master is generally charged to "take such evidence as may be . . . necessary," *Nebraska* v. *Iowa*, 379 U. S. 996 (1965), and to "find the facts specially and state separately his conclusions of law thereon." *Mississippi* v. *Louisiana*, 346 U. S. 862 (1953). In original cases, as under the Federal Magistrates Act, the master's recommendations are advisory only, yet this Court regularly acts on the basis of the master's report and exceptions thereto.

between the demands of due process and the constraints of Art. III. Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACKMUN, concurring.

While I join the Court's opinion, my analysis of the due process issue differs somewhat from that set forth therein, and I write separately to articulate it. The Court seems to focus on the diminished importance of pretrial suppression motions and the acceptability in some agency proceedings of decisionmaking without personal observation of witnesses. For me, these considerations are of less importance than the practical concern for accurate results that is the focus of the Due Process Clause. In testing the challenged procedure against that criterion, I would distinguish between instances where the district court rejects the credibility-based determination of a magistrate and instances, such as this one, where the court adopts a magistrate's proposed result.[1]

In the latter context, the judge accurately can be described as a "backup" jurist whose review serves to enhance reliability and benefit the defendant. Respondent was afforded procedures by which a neutral decisionmaker, after seeing and hearing the witnesses, rendered a decision.[2] After that decisionmaker found against him, respondent received a second

[1] This is not to say that a district court's rejection of a magistrate's recommendation in favor of a defendant will inevitably violate the Due Process Clause.

[2] The magistrate, of course, makes only a recommendation, rather than a formal decision. But, at least in this context, I see no reason to believe that the process of "recommending" is more susceptible to error than "finally deciding." And even if we were to speculate that some additional risk of error inheres in "recommending," I would conclude that it is more than offset by the doublecheck provided by the district judge and the congressional determination that this procedure permits independent judicial evaluation of suppression motions while conserving scarce judicial resources.

turn, albeit on a cold record, before another neutral decisionmaker. In asking us to invalidate the magistrate program, respondent in effect requests removal of the second level of procedural protections afforded him and others like him.[3] In my view, such a result would tend to undermine, rather than augment, accurate decisionmaking. It therefore is not a result I could embrace under the Due Process Clause.

Although MR. JUSTICE MARSHALL ably argues that this characterization of the magistrate procedure clashes with Art. III, I am not persuaded. As the Court observes, the handling of suppression motions invariably remains completely in the control of the federal district court. The judge may initially decline to refer any matter to a magistrate. When a matter is referred, the judge may freely reject the magistrate's recommendation. He may rehear the evidence in whole or in part. He may call for additional findings or otherwise "recommit the matter to the magistrate with instructions." See 28 U. S. C. § 636 (b)(1). Moreover, the magistrate himself is subject to the Art. III judge's control. Magistrates are appointed by district judges, § 631 (a), and subject to removal by them, § 631 (h). In addition, district judges retain plenary authority over when, what, and how many pretrial matters are assigned to magistrates, and "[e]ach district court shall establish rules pursuant to which the magistrates shall discharge their duties." § 636 (b)(4). Thus, the only conceivable danger of a "threat" to the "independence" of the magistrate comes from within, rather than without, the judicial department.

It is also significant that the Magistrates Act imposes significant requirements to ensure competency and impartiality, §§ 631 (b), (c), and (i), 632, 637 (1976 ed. and

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[3] Certainly respondent does not have a due process right to have an Art. III judge resolve all factual issues surrounding his suppression motion. If he did, virtually every decision on a suppression motion in a state court would violate the Due Process Clause.

Supp. II), including a rule generally barring reduction of salaries of full-time magistrates, § 634 (b). Even assuming that, despite these protections, a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors. Under these circumstances, I simply do not perceive the threat to the judicial power or the independence of judicial decisionmaking that underlies Art. III. We do not face a procedure under which "Congress [has] delegate[d] to a non-Art. III judge the authority to make final determinations on issues of fact." *Post*, at 703 (dissenting opinion). Rather, we confront a procedure under which Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities.

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I agree with the Court's interpretation of the Federal Magistrates Act in Part III of its opinion. The terms and legislative record of § 636 (b)(1) plainly indicate that Congress intended to vest broad discretion in the district courts to decide whether or not to rehear witnesses already heard by a magistrate in a suppression proceeding.

The Court recognizes that "serious questions" would be raised if a district judge rejected a magistrate's proposed findings on credibility. See *ante*, at 681, n. 7. But the Court finds no error in this case, where the District Court accepted the Magistrate's judgment on credibility. I would reach a different conclusion. Under the standards set out in *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), due process requires a district court to rehear crucial witnesses when, as in this case, a suppression hearing turns *only* on credibility. As MR. JUSTICE MARSHALL points out in his dissenting opinion,

the private interests at stake in a suppression hearing often are substantial. Moreover, the risk of erroneous deprivation of rights is real when a decider of fact has not heard and observed the crucial witnesses. The value of hearing and seeing those witnesses testify is undeniable. Finally, the government interest in limiting rehearing is not sufficient to outweigh these considerations.

In sum, I agree with MR. JUSTICE MARSHALL's statement that, under the Due Process Clause of the Fifth Amendment, a hearing requirement should be imposed

> "only in situations in which the case turns on issues of credibility that cannot be resolved on the basis of a record. . . . If the district judge offered a statement of reasons presenting his independent view of the facts and explaining in some reasoned manner why it was not necessary for him to hear the witnesses in order to adopt that view, it would be an exceptionally rare case in which an abuse of discretion should be found." *Post*, at 701–702.*

I would affirm the judgment of the Court of Appeals on this ground.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

A federal indictment was returned charging the respondent, who had previously been convicted of a felony, with unlawfully receiving a firearm in violation of 18 U. S. C. § 922 (h) (1). Before the trial, the respondent filed in the District Court a motion to suppress various incriminating statements he had made to agents of the Federal Bureau of Alcohol,

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*The classic situation requiring a hearing *de novo* is when the record of a suppression proceeding contains little beyond a "swearing contest." In many cases, however, the entire record will contain additional evidence—direct or circumstantial—that fully supports the magistrate's recommendation. In those cases, the district court may decide, within its sound discretion, not to hear witnesses.

Tobacco, and Firearms.[1] Pursuant to the Federal Magistrates Act (Act), 28 U. S. C. § 636 (b)(1),[2] the District Judge referred this motion to a Magistrate, who held an evidentiary hearing and then recommended that the respondent's motion be denied. Without taking further evidence the District Judge accepted the Magistrate's recommendation and denied

[1] The respondent also moved to suppress certain statements the Government claimed he had made to Chicago police officers shortly after his arrest. At the suppression hearing, the respondent denied having ever made such remarks. A Chicago police officer testified to the contrary, making the issue one for determination at trial by the trier of fact.

[2] Title 28 U. S. C. § 636 (b)(1) provides:

"Notwithstanding any provision of law to the contrary—

"(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

"(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for postrial [*sic*] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

"Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

the motion to suppress. The Court of Appeals reversed, holding that the respondent was constitutionally entitled to a hearing by the judge before his suppression motion could be denied. Today this Court reverses that judgment. I dissent, because I believe that the statute itself required a hearing before the judge in this case.

The statute provides that a district judge, in ruling on a motion to suppress, "shall make a *de novo determination* of those portions of the [magistrate's] report or specified proposed findings or recommendations to which objection is made." 28 U. S. C. § 636 (b)(1) (emphasis added). It is my view that the judge could not make the statutorily required "de novo determination" of the critically contested factual issues in this case without personally observing the demeanor of the witnesses.

At the hearing before the Magistrate the respondent testified that he had made the incriminating statements to the federal agents only because they promised that he would not be prosecuted if he cooperated, and offered to employ him as an informer. The agents gave a different version of the relevant events. They expressly testified that at no time was the respondent ever told that he would not be prosecuted. Instead, according to the agents, he was simply told that any assistance he might provide would be mentioned to the United States Attorney. Their story also undermined the respondent's testimony that he had been offered employment as an informer before he made the incriminating statements.

If the respondent's testimony was true, his motion to suppress evidence of his incriminating statements should have been granted. See *Malloy* v. *Hogan*, 378 U. S. 1, 7; *Bram* v. *United States*, 168 U. S. 532, 542–543. The Magistrate, however, did not believe him, expressly finding that "the testimony of the Alcohol, Tobacco and Firearms agent[s is] more credible" and that the "Federal agents never advised Raddatz that charges against him would be dismissed, if he cooperated." In concluding for this reason that the motion should be denied,

the Magistrate properly exercised the authority granted him by 28 U. S. C. § 636 (b)(1)(B) "to submit . . . proposed findings of fact and recommendations for the disposition" of the suppression motion. But the Act also empowered the respondent to object to these findings. He did so, and the responsibility then devolved on the District Judge to "make a de novo determination" of the contested issues of fact.

The phrase "de novo determination" has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 23, the Court had occasion to define "de novo proceeding" as a review that was "unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency's] determination is supported by substantial evidence."[3] And, in *United States* v. *First City National Bank*, 386 U. S. 361, 368, this Court observed that "review de novo" means "that the court should make an independent determination of the issues" and should "not . . . give any special weight to the [prior] determination of" the administrative agency.[4]

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[3] In *Renegotiation Board* v. *Bannercraft Clothing Co.*, the Court was construing the following language in the Renegotiation Act of 1951 as amended:

"Any contractor . . . aggrieved by an order of the Board [of Renegotiation] determining the amount of excessive profits received or accrued by such contractor . . . may—

. . . . . .

file a petition with the Court of Claims for a redetermination thereof. . . . A proceeding before the Court of Claims to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. . . ." 65 Stat. 21, as amended, 50 U. S. C. App. § 1218.

[4] In *United States* v. *First City National Bank*, the Court was construing 12 U. S. C. § 1828 (c)(7)(A), which provides that in an antitrust action brought under the Bank Merger Act of 1966 the court "shall review de novo the issues presented."

Here, the District Judge was faced with a transcript that contained two irreconcilable accounts of the critical facts. Neither version was intrinsically incredible or, for that matter, less plausible on its face than the other. Moreover, there was in the record no evidence inherently more trustworthy than that supported by human recollection. In these circumstances, the District Judge could not make the statutorily mandated "de novo determination" without being exposed to the one kind of evidence that no written record can ever reveal—the demeanor of the witnesses.[5] In declining to conduct a hearing in this case, the District Judge thus necessarily gave the Magistrate's prior assessment of credibility the kind of "special weight" that the "de novo determination" standard does not permit.

Contrary to the Court's assertion, nothing in the legislative history of the 1976 amendments to the Federal Magistrates Act compels a different conclusion. Congress, to be sure, explicitly rejected a version of the ultimately enacted bill that would have required a district judge always to "hear de novo" those aspects of the case whose proposed resolution by the magistrate dissatisfied one or more of the parties. Compare S. Rep. No. 94–625, p. 2 (1976) (hereinafter S. Rep.) (bill as reported by Senate Committee on the Judiciary), with S. 1283, 94th Cong., 1st Sess. (1975) (bill as originally introduced by Senator Burdick). Moreover, as the Court points out, the Report of the House Judiciary Committee says that "[t]he use of the words 'de novo determination' is not intended to require the judge to actually conduct a new hearing on contested issues." H. R. Rep. No. 94–1609, p. 3 (1976) (hereinafter H. R. Rep.).

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[5] In other contexts, the Courts of Appeals have held that critical issues of credibility can be resolved only by personally hearing live testimony. See, *e. g.*, *Weahkee* v. *Perry*, 190 U. S. App. D. C. 359, 370, 587 F. 2d 1256, 1267 (1978) (Title VII of Civil Rights Act of 1964); *Hackley* v. *Roudebush*, 171 U. S. App. D. C. 376, 427, and n. 202, 520 F. 2d 108, 159, and n. 202 (1975) (same); *Pignatello* v. *Attorney General*, 350 F. 2d 719, 723–724 (CA2 1965) (Immigration and Nationality Act).

Other passages in the legislative history, however, make clear that these indications of legislative intent comport with the plain language of the statute. As the Senate and House Reports emphasize, "the ultimate adjudicatory power over" suppression and other dispositive motions is to be "exercised by [a district] judge . . . after receiving assistance from and the recommendation of the magistrate." S. Rep., at 10; H. R. Rep., at 11. Thus, according to the House Report, a district judge, "in making the ultimate determination of the matter, would have to give *fresh consideration* to those issues to which specific objection has been made by a party." *Id.*, at 3 (emphasis supplied). The Report describes this responsibility as follows:

> "*Normally*, the judge . . . will consider the record which has been developed before the magistrate and make his own determination on the basis of that record. . . . In some specific instances, however, it may be *necessary* for the judge . . . *to take additional evidence*, recall witnesses. . . ." *Ibid.* (emphasis supplied).

See also 122 Cong. Rec. 35182 (1976) (Rep. Railsback). It is thus evident that Congress anticipated that occasions would arise when a district judge could not make the requisite "de novo determination" without hearing the evidence himself.[6]

Congress' prime objective in 1976 was to overrule this Court's decision in *Wingo* v. *Wedding*, 418 U. S. 461, which had interpreted the then existing Federal Magistrates Act as

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[6] Nothing in the passage from the opinion of the Court of Appeals in *Campbell* v. *United States District Court*, 501 F. 2d 196, 206–207 (CA9 1974), that is quoted in the House Report can be read to mean anything different. In *Campbell*, the court said that a district court "may, in the exercise of its discretion, call and hear the testimony of a witness or witnesses" when "it finds there is a problem as to the credibility of a witness or witnesses or for other good reasons." Nothing said in *Campbell*, however, implied that a district judge's failure to call a witness or witnesses is invariably permissible.

barring a magistrate from holding an evidentiary hearing on a petition for habeas corpus. See S. Rep., at 3, 9; H. R. Rep., at 5, 11. The 1976 Act thus granted magistrates the power to take evidence on matters like habeas corpus petitions and motions to suppress. By enacting such legislation, Congress obviously anticipated that hearings conducted by magistrates would in many instances obviate the need for district judges to take evidence as well.

It does not follow, however, that Congress told district judges that they need not conduct hearings in every case where an evidentiary hearing has been conducted by a magistrate, regardless of the circumstances. Instead, Congress expressly limited the "clearly erroneous" standard of review to pretrial motions that are termed non-"dispositive" in the Act's legislative history, see S. Rep., at 7, 9–10; H. R. Rep., at 9, 10–11, and excluded habeas corpus petitions, motions to suppress, and other important motions from that category, see 28 U. S. C. § 636 (b)(1).

The Court suggests that a plain reading of the statutory language would, as a practical matter, frustrate the Act's objective of alleviating the increasing congestion of litigation in the district courts. But, as I interpret the statutory language, district judges need not always hold evidentiary hearings in order properly to dispose of suppression motions. Although many motions to suppress turn on issues of credibility, many do not. A suppression motion predicated, for instance, on the claim that a search warrant was not supported by an adequate affidavit could normally be resolved without the taking of any testimony.

More importantly, the "de novo determination" requirement of the Federal Magistrates Act applies to a much wider range of motions and applications than simply pretrial motions to suppress.[7] Some of these—such as motions to dismiss for failure to state a claim, motions for judgment on the pleadings,

[7] See n. 2, *supra*.

and motions for summary judgment—presume as a legal matter the lack of any need for an evidentiary hearing, even at the magistrate's level. Others—such as motions for injunctive relief, motions to dismiss or quash an indictment, motions to dismiss or to permit maintenance of a class action, motions to dismiss an action involuntarily, applications for post-trial relief made by those convicted of criminal offenses, and petitions by prisoners challenging conditions of confinement—could often, as a practical matter, be granted or denied by a district court on the strength alone of the transcript of the magistrate's hearing and his recommendation. Thus, contrary to the Court's suggestion, the plain reading I would give to the pertinent statutory language would not equate "de novo determination" with "de novo hearing."

Since I believe that the plain language of the statute required the District Judge in this case to hear the conflicting factual testimony of the witnesses, I would affirm the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

I agree with my Brother STEWART that the statutory provision for "a de novo determination of . . . specified proposed findings . . . to which objection is made," 28 U. S. C. § 636 (b)(1), should be construed to require the district court to conduct an evidentiary hearing when there are case-dispositive issues of credibility that cannot be resolved on the basis of the record compiled before the magistrate. I write separately to express my view that unless the Act is construed in that fashion, its application in this case is impermissible under the Due Process Clause of the Fifth Amendment and under Art. III.

In my view, the Due Process Clause requires that a judicial officer entrusted with finding the facts in a criminal case must hear the testimony whenever a fair resolution of disputed issues cannot be made on the basis of a review of the cold

record. Accordingly, if the Act permits the district judge not to hear the witnesses, but at the same time requires him to make a *de novo* determination of the facts, its application violates the Due Process Clause in any case that turns on issues of credibility that cannot be resolved on the written record. This infirmity cannot be avoided by interpreting the Act to allow the district judge to give final effect to the magistrate's findings on issues of credibility. Such an interpretation would render the Act fatally inconsistent with Art. III of the Constitution, which entitles a criminal defendant in a federal court to an independent determination of the case-dispositive facts by an Art. III judge.

I

The Court of Appeals held that the unconsented referral of the suppression motion to the Magistrate was not an unlawful delegation of the federal judicial power to a non-Art. III judge. To reach this conclusion, it relied on its understanding that the Act required the District Judge to make a *de novo* determination of all contested issues. At the same time, it concluded that the Due Process Clause required the District Judge to hear the witnesses before making a *de novo* determination of the facts. The Court rejects this conclusion in an analysis suggesting that the individual's interest in vindicating his right against compulsory self-incrimination is an unimportant one. I disagree.

A

One of the most deeply engrained principles in Anglo-American jurisprudence requires that an official entrusted with finding facts must hear the testimony on which his findings will be based. As I explained in *Swisher* v. *Brady*, 438 U. S. 204, 229–233 (1978) (dissenting opinion),[1] our constitutional

[1] *Swisher* involved a Maryland procedure whereby a master first made factual findings with respect to the issue of juvenile delinquency, and a judge subsequently conducted a *de novo* review of the evidence. The

tradition rejects the notion that factual findings in criminal cases may be made by an official who acts in isolation and on the basis of a cold record.

The principle that "[t]he one who decides must hear," *Morgan* v. *United States*, 298 U. S. 468, 481 (1936), is supported by two distinct rationales. First, judicial factfinding on the basis of a written record carries an intolerably high risk of error. Any experienced lawyer is aware that findings of fact frequently rest on impressions of demeanor and other factors which do not appear on the face of the record. As the Court stated in *Holiday* v. *Johnston*, 313 U. S. 342, 352 (1941), "[o]ne of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony." Accordingly, the Court has rejected the proposition "that an appraisal of the truth of the [witness'] oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts." See also *Wingo* v. *Wedding*, 418 U. S. 461 (1974); *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339 (1952); *Dyer* v. *MacDougall*, 201 F. 2d 265, 268–269 (CA2 1952).

The principle is not, however, based solely on the constitutional interest in accurate factfinding. It also derives from the notion that, as a matter of basic fairness, a person facing the prospect of grievous loss is entitled to relate his version of the facts to the official entrusted with judging its accuracy. The Due Process Clause "promot[es] participation and dia-

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judge's review was confined to the record, with the exception that he could receive additional evidence when the parties did not object. The Court held that the procedure did not violate the Double Jeopardy Clause, but reserved the due process issue on the ground that it was not properly presented. Writing for myself and my Brothers BRENNAN and POWELL, I expressed the view that the issue was before us and that the procedure violated the due process principle that, where demeanor evidence is critical, the ultimate factfinder in a criminal case must hear the witnesses on whose testimony his findings will be based.

logue . . . in the decisionmaking process," *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242 (1980), by ensuring that individuals adversely affected by governmental action may confront the ultimate decisionmaker and thus play some part in formulating the ultimate decision. See *Carey* v. *Piphus*, 435 U. S. 247 (1978); *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 103, n. 15 (1978) (MARSHALL, J., concurring in part and dissenting in part).[2] In this respect, the requirement that a finder of facts must hear the testimony offered by those whose liberty is at stake derives from deep-seated notions of fairness and human dignity. See *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 170 (1951) (Frankfurter, J., concurring). A rule that would allow a criminal defendant to face a jail sentence on the basis of factual findings made by one who has not heard the evidence is, in my view, foreign to notions of fair adjudicative procedure embodied in the Due Process Clause.[3]

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[2] Cf. Michelman, Formal and Associational Aims in Procedural Due Process, in J. Pennock & J. Chapman, Due Process: Nomos XVIII, pp. 126–171 (1977). I do not, of course, mean to suggest that all adverse effects fall within the categories of "life, liberty, [and] property" under the Fifth and Fourteenth Amendments. In recent years the Court has held that those terms encompass only so-called statutory entitlements and certain kinds of grievous losses. See *Vitek* v. *Jones*, 445 U. S. 480 (1980); cf. *PruneYard Shopping Center* v. *Robins*, *ante*, at 93–94, and n. 2 (MARSHALL, J., concurring).

[3] The principle that deference must be paid to the findings of the official who hears the testimony is reflected in a wide variety of areas of the law. Under Rule 52 of the Federal Rules of Civil Procedure, a trial court's factual findings may be reversed only when "clearly erroneous," a standard that reflects the common understanding that "[f]ace to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth." *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339 (1952). For this reason, the successor of a trial judge who has resigned or died after the conclusion of a trial is ordinarily barred from resolving factual disputes on the basis of the trial transcript. *Brennan* v.

I do not, of course, mean to suggest that a district judge must hear the witnesses in every case, or even in all cases in which issues of credibility are raised. An actual rehearing would be required only in cases involving case-dispositive issues that are impossible to resolve on the basis of the written record. But as my Brother STEWART demonstrates, the District Judge could not make an independent finding in this case without hearing the witnesses. Neither respondent's nor the agents' story carried inherent indicia of reliability. Both accounts suffered from inconsistencies. In the end the issue was solely one of credibility. On the basis of the cold record, the District Judge had no basis for determining whether the respondent or the agents were telling the truth. He was required, therefore, either blindly to accept the Magistrate's findings as to matters of credibility or to flip a coin. The first course is forbidden by the statute and by Art. III;[4] the second is forbidden by the requirements of fair adjudicative procedure that the Due Process Clause reflects.

B

It is true that the principle that "[t]he one who decides must hear" should not be applied with mechanical rigidity. Administrators are permitted to base factual findings on a record compiled before a hearing examiner who does not play a role in formulating the ultimate findings. See *Morgan* v.

Grisso, 91 U. S. App. D. C. 101, 198 F. 2d 532 (1952); *United States* v. *Nugent*, 100 F. 2d 215 (CA6 1938), cert. denied, 306 U. S. 648 (1939). And in *United States ex rel. Graham* v. *Mancusi*, 457 F. 2d 463 (CA2 1972) (Friendly, J.), the court applied the principle in habeas corpus proceedings to invalidate a procedure under which a state appellate court had entered a conviction for a lesser offense when reversal of the original conviction was required because of improperly admitted evidence. The court stated: "Due process forbids that, when an issue of fact is presented, a man should be sent to prison without the trier of the facts having seen and heard his accusers and himself, if he desires to testify, and weighing their credibility in the light of their demeanor on the stand." *Id.*, at 469.

[4] See Part II, *infra*.

United States, 298 U. S. 468, 481 (1936); 2 K. Davis, Administrative Law Treatise § 11.02 (1958). Similar qualifications of the principle have been recognized by lower courts in certain civil contexts. See, *e. g.*, *Utica Mutual Ins. Co.* v. *Vincent*, 375 F. 2d 129 (CA2), cert. denied, 389 U. S. 839 (1967) (National Labor Relations Board determination of proper unit in a representation election). The Court errs, however, in suggesting that those exceptions provide support for the decision announced today. In a number of the cases in which such exceptions have been permitted, the factual issues to be resolved did not at all depend on issues of credibility; the demeanor of the witnesses was entirely irrelevant. See examples cited *ante*, at 680. And in other cases, the factfinder was not entrusted, as was the District Judge here, with making a *de novo* determination, but was instead permitted to give appropriate deference to the conclusions of the official who conducted the hearing. See 2 K. Davis, *supra*, § 10.04.

I am aware of no case, and the Court cites none, in which a federal court has upheld a procedure in which a judge is required to conduct a *de novo* determination without hearing the witnesses when the factual issues have turned on issues of credibility that cannot be fairly resolved on the basis of the record. Under such a procedure, the judge's determination is so inevitably arbitrary, and so plainly a blind guess, that I believe it to be prohibited by the Due Process Clause under any circumstances. But even if I were not so persuaded, the answer in the present context would be clear, for the simple reason that this case is criminal in nature. It is, of course, in such cases that the need for scrupulous observance of procedural safeguards is greatest. Whatever the appropriate limits of the principle that the factfinder must hear the witnesses where demeanor evidence is critical, the principle is fully applicable to criminal cases.

As the Court correctly observes, see *ante*, at 677, under *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), the determination of "what process is due" turns on a balancing of three

factors: "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." The Court recites this test, but it does not even attempt to apply it.

Instead, the Court resolves the due process issue solely by distinguishing a motion to suppress evidence from a criminal trial. See *ante*, at 677–681. To state the obvious point that guilt or innocence is not determined in a suppression hearing, however, is only the beginning of the inquiry. That fact does not render the interest of both the defendant and the public in vindicating the right against compulsory self-incrimination an unimportant one, or make it analogous to other interests, such as those involved in a securities transaction, that have been thought to merit comparatively little due process protection, see *ante*, at 680. *Mathews* contemplates and requires a thorough inquiry into the three factors it specifies rather than the conclusory approach taken by the Court today.

The private interests at stake here are hardly insignificant. The suppression hearing was conducted to determine whether the agents had violated respondent's privilege against self-incrimination, an interest that the Constitution singles out for special protection and that our cases recognize as fundamentally important. See, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Moreover, respondent's liberty was wholly dependent on whether the trier of fact believed his account of his confession rather than that of the agents. The subsequent history of the case confirms this fact. As my Brother POWELL has explained: "In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow. The government's case may turn

upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling on such evidence may determine the outcome of the case." *Gannett Co.* v. *DePasquale,* 443 U. S. 368, 397, n. 1 (1979) (POWELL, J., concurring). See also *id.,* at 434 (BLACKMUN, J., dissenting in part). Indeed, Congress itself recognized the importance of suppression motions by providing for a *de novo* determination by the district judge.

Second, both the risk of an erroneous deprivation and the probable value of the additional safeguard were substantial. The issues presented here could not be resolved *de novo* solely on the basis of the record. As my Brother STEWART suggests, the case was a classic swearing match: the only issues were ones of credibility. The risk of error could be minimized only if the District Judge heard the witnesses himself.

The Court itself confirms that if the judge does not hear the witnesses his decisions on credibility issues can only be a blind guess, when it intimates that a district judge may not *reject* a magistrate's findings without hearing the witnesses. See *ante,* at 680–681. The sole distinction that can be drawn between accepting the magistrate's findings and rejecting them is that in the former case the district judge is deferring to the magistrate. But the Court rejects this distinction by asserting, in order to avoid the Art. III objection, that in either event it is the district judge who "[makes] the ultimate decision." See *ante,* at 683.

Finally, the governmental interest—essentially one of administrative convenience—is not in this context substantial. The Court of Appeals' holding would not require the district judge to hear the witnesses whenever objection is made to the magistrate's findings. A rehearing requirement would be imposed only in situations in which the case turns on issues of credibility that cannot be resolved on the basis of a record. Nor is there much force to the Government's argument that an occasional rehearing of the witnesses would impose an

intolerable burden on the district courts.[5] Finally, I would afford the district judge considerable discretion to determine whether a rehearing of the witnesses was required in order for him to make the requisite *de novo* determination. If the district judge offered a statement of reasons presenting his independent view of the facts and explaining in some reasoned manner why it was not necessary for him to hear the witnesses in order to adopt that view, it would be an exceptionally rare case in which an abuse of discretion should be found.

In this case, it is plain that a *de novo* determination could not be made without hearing the witnesses. I am therefore brought to the conclusion that the Due Process Clause required the District Judge to rehear the witnesses. Indeed, a contrary conclusion would suggest that, save for the criminal trial itself, there may be *no* settings in which the principle that "[t]he one who decides must hear" will carry force.

In *Speiser* v. *Randall*, 357 U. S. 513, 520 (1958), we observed that "the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." By today's decision, the Court permits the vindication of Fifth Amendment rights to depend on a form of bureaucratic factfinding foreign to our

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[5] Experience shows that motions to suppress evidence consume a relatively small proportion of the time of federal district judges. A recent study indicated that suppression motions involving confessions were filed in only 4% of all federal criminal cases. GAO, Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Report by the Comptroller General of the United States, App. II, p. 8 (Apr. 19, 1979). Moreover, a rehearing by the district judge would be required only in some of those cases, since the rehearing requirement would be imposed solely in situations (1) involving case-dispositive issues that (2) could not be resolved on the basis of the record and (3) that were contested by a party. Finally, the rehearing requirement would create an additional burden only where the judge would otherwise choose not to hear the witnesses. In light of these factors, the incremental expenses that would be imposed by the ruling of the Court of Appeals would be relatively small.

constitutional traditions. I am unwilling to join in that enterprise.

II

The due process infirmity cannot be remedied by interpreting the statute to permit the district judge to give final effect to the magistrate's findings on issues of credibility. Such an interpretation would render the Act fatally inconsistent with Art. III of the Constitution. The Court attempts to avoid this conclusion by suggesting that the district judge retains "control" of the suppression motion and by indicating that Art. III in any event does not prohibit a federal court from giving final effect to a magistrate's findings of fact. I find neither argument convincing.

A

At the outset, it is important to observe that the Court's suggestion that "a magistrate's recommendations [are] analogous to [those of] a master or a commissioner," *ante,* at 682–683, is highly misleading. If the motion to suppress turns on issues of credibility that cannot be resolved on the basis of the record, and if the district judge does not hear the witnesses, the magistrate's report is no mere "recommendation." Unless the district judge ventures a blind guess, that report is effectively the final determination of the facts underlying the suppression motion. For this reason, it is simply incorrect to say that the "ultimate decision is made by the district court." *Ante,* at 683. This case squarely presents the issue whether, in a criminal case tried in federal court, Congress may delegate to a non-Art. III judge the authority to make final determinations on issues of fact.

Article III vests the "judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It provides that judges "both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation,

which shall not be diminished during their Continuance in Office."

The rationale underlying the tenure and salary protections of Art. III has often been stated and need not be rehearsed in detail here. But it is worth remembering that the Framers of the Constitution believed that those protections were necessary in order to guarantee that the judicial power of the United States would be placed in a body of judges insulated from majoritarian pressures and thus able to enforce constitutional principles without fear of reprisal or public rebuke. See The Federalist Nos. 78 and 79; *Glidden Co.* v. *Zdanok*, 370 U. S. 530 (1962) (plurality opinion); *O'Donoghue* v. *United States*, 289 U. S. 516, 530 (1933).

In this case it is agreed that magistrates are not Art. III judges. Appointed by the judges of the district court, they serve 8-year terms. They are subject to removal by the judges of the district court for "incompetency, misconduct, neglect of duty, or physical or mental disability." If the Judicial Conference concludes that "the services performed by his office are no longer needed," 28 U. S. C. § 631 (h), a magistrate's office may be terminated. None of these factors, of course, suggests that a magistrate will be unable to perform his assigned tasks fairly and in accordance with constitutional principles. But there can be no doubt that one holding the office of magistrate is unprotected by the safeguards that the Framers regarded as indispensable to assuring the independence of the federal judiciary.

It is true that a number of our decisions have recognized Congress' authority to create legislative tribunals unprotected by the tenure and salary provisions of Art. III. See *Glidden Co.* v. *Zdanok*, *supra*, at 543–552, and cases cited. Those decisions do not, however, provide any support for the proposition that Congress may, with respect to suppression hearings in criminal cases, displace the federal judiciary and entrust the finding of case-dispositive facts to a non-Art. III tribunal.

The rationale of our decisions involving legislative courts has been far more limited, focusing on Congress' plenary power over specialized areas of geography or subject matter and on the manifest need for a more flexible tribunal to perform adjudicatory functions in those areas. See generally 370 U. S., at 543–552. Nor has the Court suggested that it will defer blindly to a congressional determination that an alternative tribunal is necessary. "The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives." *Id.*, at 547–548. Thus "the requirements of Art. III, *which are applicable where laws of national applicability and affairs of national concern are at stake,* must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Palmore* v. *United States,* 411 U. S. 389, 407–408 (1973) (emphasis added). Congress has never attempted to displace Art. III courts when laws of nationwide applicability were involved, and nothing in our prior decisions suggests that it may constitutionally do so.[6]

[6] The Government contends that since Congress is constitutionally entitled not to create federal courts, see *Palmore* v. *United States,* 411 U. S. 389 (1973); *Sheldon* v. *Sill,* 8 How. 441 (1850), and may instead entrust the resolution of federal questions to state courts, it follows that Congress also has the authority to create federal tribunals that do not carry the safeguards of Art. III. Such a view would, of course, render the requirements of Art. III practically meaningless by permitting Congress to vest the judicial power in whatever tribunal it chose.

The argument is unpersuasive for two additional reasons. First, it represents a revival of the now discredited idea that Congress may attach whatever conditions it wishes to entities or programs that it is free not to create. Cf. *Vitek* v. *Jones,* 445 U. S., at 487–494. But there is no logical infirmity in concluding that although Congress is free not to create

Our decision in *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955), confirms that there are severe limits on Congress' authority to displace Art. III courts. In that case the Government attempted to try a civilian ex-serviceman in a military tribunal. The Court agreed that Congress' authority under Art. I, § 8, cl. 14, "To make Rules for the Government and Regulation of the land and naval Forces" permitted it to subject persons in the Armed Services to trial by court-martial. Nonetheless, it concluded that the clause shou'd not be construed to encompass civilian ex-servicemen. Such a construction, the Court held, "necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution." *Id.*, at 15. The Court emphasized that "[t]he provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government." *Id.*, at 16. Accordingly, Congress' power to circumvent criminal trials in Art. III tribunals would not "be inferred through the Necessary and Proper Clause," but would instead call "for limitation to 'the least possible power adequate to the end

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federal courts, if it chooses to do so, those courts must be as described in Art. III, subject to limited exceptions.

Second, the argument misconceives the intentions that underlay the constitutional compromise embodied in Art. III. The Framers were especially concerned about the possibility of an alliance between federal judges and the Congress. For this reason, they ensured that federal judges would be isolated from the legislative branch of the Federal Government and protected from congressional reprisal. State courts were perceived as necessarily independent from the Federal Government and as a relatively reliable buffer against its excesses. No such assurance would be possible with respect to federal judges unprotected by the provisions of Art. III. It follows from those assumptions that under Art. III, Congress is generally prohibited from creating specially accountable federal tribunals but at the same time is permitted to entrust issues of federal law to state tribunals. See generally Tushnet, Invitation to a Wedding: Some Thoughts on Article III and a Problem of Statutory Interpretation, 60 Iowa L. Rev. 937, 944–945 (1975); cf. R. Berger, Congress v. The Supreme Court 8, 117–119 (1969).

proposed,'" *id.*, at 22–23 (emphasis omitted), quoting *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1821). The *Quarles* decision has been applied in other contexts to limit sharply Congress' power to try civilians in Art. I courts. See *Reid* v. *Covert*, 354 U. S. 1 (1957) (civilian dependents living with servicemen on military base may not be tried in Art. I court); *O'Callahan* v. *Parker*, 395 U. S. 258 (1969) (crimes that are not service connected may not be tried in Art. I court). In my view, *Quarles* and its progeny foreclose the conclusion that Congress may use its Art. I powers to create legislative tribunals in order to divest Art. III courts of their authority to conduct federal criminal proceedings.

B

As the Court observes, see *ante*, at 681, Congress has not in this case attempted to substitute magistrates for Art. III judges on a wholesale basis. The district court retains authority over questions of law. Under the Court's construction, it is also compelled to make a *de novo* determination of the facts, to the extent that that task can be performed on the basis of an evidentiary record. Reasoning by analogy from the context of masters and commissioners, the Court suggests that the retained power of the district court is sufficient to satisfy the requirements of Art. III. As I have explained, however, when a district judge does not hear the witnesses, it is the magistrate who makes the final determination of factual questions in any case involving issues of credibility that cannot be resolved on the basis of the record. The Court's conclusion must therefore rest on an understanding that the requirements of Art. III are fully applicable when the issues are ones of law, but not when the issues are factual in nature. See *ante*, at 683. I am unable to discern any such distinction in Art. III or in any other provision of the Constitution.

As the Court rightly observes, the primary case relevant to the question is *Crowell* v. *Benson*, 285 U. S. 22 (1932). There the Court upheld the constitutionality of an administrative

scheme by which deputy commissioners adjudicated compensation claims under the Longshoremen's and Harbor Workers' Compensation Act, but at the same time ruled that the federal district court must find *de novo* whether a master-servant relationship existed and whether the injury occurred on the navigable waters of the United States. Mr. Chief Justice Hughes, speaking for the Court, did rely on the "historic practice" of permitting the courts to be assisted in factual findings by masters and commissioners, *id.*, at 51. But the Court's opinion in *Crowell* provides no authority for the statutory scheme upheld today.

The Court in *Crowell* expressly rejected the proposition that Congress had authority to displace the federal judiciary by removing all questions of fact from Art. III courts. "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Id.*, at 60. The Court's reasoning on this point bears quotation in full:

> "[T]he question is not the ordinary one as to the propriety of provision for administrative determinations. . . . It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could com-

> pletely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." *Id.*, at 56–57.

The Court relied on *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), where it held that persons involved in deportation proceedings and claiming to be citizens of the United States are constitutionally entitled to a *de novo* judicial determination of their factual claims. "[W]hen fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action.'" *Crowell* v. *Benson*, *supra*, at 61, quoting *Ng Fung Ho* v. *White*, *supra*, at 285. In this respect, the Court found that its earlier discussion of the historical use of masters and commissioners was irrelevant, for even as to factual issues "their reports are essentially advisory, a distinction of controlling importance when questions of a fundamental character are in issue." *Crowell* v. *Benson*, *supra*, at 61.

In his celebrated dissent, Mr. Justice Brandeis rejected the view that the particular factual issues in *Crowell* were ones that must constitutionally be resolved *de novo* in an Art. III court. He did agree, however, that there are some issues of fact which must be found independently in an Art. III court. "[U]nder certain circumstances," he stated, "the constitutional requirement of due process is a requirement of judicial process." 285 U. S., at 87. As he explained in a subsequent opinion: "A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of *a judicial determination of the facts.* And, so highly is this liberty prized, that the opportunity must be accorded to any

resident of the United States who claims to be a citizen." *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 77 (1936) (concurring opinion) (emphasis added).[7]

It may fairly be said that in certain respects at least, Mr. Justice Brandeis' views in *Crowell* and *St. Joseph Stock Yards* have become the law. It can no longer be claimed that a person is entitled under Art. III or the Due Process Clause to a *de novo* judicial determination of the facts in every case that implicates constitutional rights. Yet neither *Crowell* nor *Ng Fung Ho* has been overruled, and the Court has cited both with approval in recent years. See *Agosto* v. *INS*, 436 U. S. 748, 753 (1978); *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 450, n. 7 (1977). Cf. *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 118 (1976) (REHNQUIST, J., dissenting); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 102, and n. 20 (1973) (BRENNAN, J., dissenting).[8]

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[7] Federal courts on habeas corpus are not obliged to examine the facts independently in every case. Under *Townsend* v. *Sain*, 372 U. S. 293 (1963), deference to the state-court findings is permitted in the absence of any allegation of procedural irregularity. As the holdings of *Ng Fung Ho* and *Crowell* make clear, however, this deference is based on the special role played by state courts in the federal system, and not on any rule allowing Congress to create non-Art. III tribunals to make findings of fact that are binding on Art. III courts. See n. 6, *supra*.

[8] In *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53 (1936), the Court indicated that, in the context of a claim of unconstitutional confiscation, the requirement of independent judicial judgment would be satisfied even if the court gives "the weight which may properly attach to findings [by an administrative body] upon hearing and evidence." In subsequent cases the Court has made clear that the scope of judicial review of confiscation claims may be limited to the substantial-evidence test. See *FPC* v. *National Gas Pipeline Co.*, 315 U. S. 575 (1942); *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944); *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341, 348 (1951); *American Trucking Assns.* v. *United States*, 344 U. S. 298 (1953). See generally 4 K. Davis, Administrative Law Treatise § 29.09 (1958). But the Court errs if it reads *St. Joseph Stock Yards* to establish the far more radical proposition that *all* questions of fact may be transferred to and decided by non-Art. III

There is no basis, then, for a conclusion that there are *no* circumstances in which a person is entitled to a determination of the facts by an Art. III court. In my view, both Mr. Chief Justice Hughes and Mr. Justice Brandeis were correct on one of the few propositions on which they were in agreement in *Crowell:* that there remain some cases in which an opportunity for an independent judicial determination of the facts is constitutionally required.

The Court's conclusion to the contrary appears premised on its perception that, under the Act, effective control of suppression motions remains in the hands of district judges, and the submission of "recommendations" by magistrates is a relatively mechanical task for which the special characteristics of an Art. III judge are unnecessary. But in view of the likely finality of the magistrate's decision and the importance of fact-finding to the process of legal decision, that view is unsupportable. As I have explained, in cases like this one the magistrate's decision is effectively unreviewable if the district judge does not hear the witnesses. The fact that the judge is permitted to hear the witnesses is an irrelevance in any case in which he does not do so. Moreover, the Court has emphasized that the vindication of constitutional rights more frequently depends on findings of fact than abstract principles of law. See *Speiser* v. *Randall*, 357 U. S., at 520. And it cannot seriously be suggested that the majoritarian pressures the Framers sought to avoid by the tenure and salary protections of Art. III become inapplicable when the relevant question is one of fact. Indeed, it is precisely in resolving constitutional issues that are dependent on questions of credibility as between a government official and one accused of crime that a detached and independent arbiter may be most indispensable. A contrary conclusion would mean that the

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federal tribunals. See *ante*, at 683. Our continued adherence to *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), demonstrates that such a reading would be unwarranted.

protections of Art. III, viewed as so fundamental by the Framers of the Constitution, were intended to apply solely to appellate judges.

C

Since I reject the suggestion that every issue of fact may be removed from Art. III courts and submitted instead to federal magistrates, the question remains whether a suppression hearing is one of the admittedly few contexts in which independent factfinding by an Art. III judge is constitutionally required. I believe that it is.

As noted above, Mr. Justice Brandeis would have restricted the requirement of independent judicial factfinding to situations in which personal liberty was at stake, such as habeas corpus and deportation. I agree that for both criminal cases and deportation, a citizen is constitutionally entitled to an independent determination of the case-dispositive facts by an Art. III court. My conclusion is based on two factors, the nature of the issue and the individual interest in a determination by an Art. III judge.[9] Resolution of the issues involved in criminal cases and deportation proceedings does not require specialization or expertise in an area in which a federal judge is untrained. Moreover, the Framers adopted Art. III precisely in order to protect individual interests of the sort involved here.[10] In my view, the independence provided by

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[9] See L. Jaffe, Judicial Control of Administrative Action 640–648 (1965). In my view, this standard is far preferable to a test that would draw a rigid line between issues of law and issues of fact, and hold that, with the exception of the criminal trial, the latter need never be resolved independently by an Art. III court. No such line appears in the Constitution, and it is contradicted by the rationale that underlies the tenure and salary protections of Art. III.

[10] Alexander Hamilton justified the tenure and salary protections of Art. III in this fashion:

"That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by

Art. III is hardly dispensable in finding facts underlying a motion to suppress evidence on Fifth Amendment grounds. Nor, for these purposes, is it possible to distinguish between suppression motions and the trial itself; as experience shows, the primary issues in a criminal case often deal with whether evidence should be excluded because illegally obtained. I am therefore brought to the conclusion that the Constitution entitled respondent to an independent judicial determination of the facts on which his motion to suppress was based.[11]

III

The Court's holding today is undoubtedly influenced by its sympathy with Congress' perception that the assistance of federal magistrates was a necessary measure to ensure that the already severe pressures on the federal district courts do not become overwhelming. I too sympathize with that concern. And I applaud the conspicuous and conscientious legislative effort to conform to the dictates of the Constitution by ensuring maximum control of suppression motions by the federal district courts. I agree with my Brother STEWART that § 636

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a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. . . .

. . . . . .

"Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" The Federalist No. 78, p. 489, and No. 79, p. 491 (Gideon ed. 1818) (emphasis in original).

[11] Actual rehearing of the witnesses, of course, would be required only in exceptional cases. In most circumstances the requirement of independent judicial factfinding would be satisfied on the basis of record review. It is only when that task cannot fairly be performed in the absence of the witnesses that a *de novo* hearing should be required. And as I have indicated, see *supra*, at 701–702, if the district judge offered a statement of reasons explaining why it was not necessary for him to hear the witnesses, an abuse of discretion would be found quite rarely. See n. 5, *supra; ante*, at 693–694 (STEWART, J., dissenting).

(b)(1) should be construed to avoid the constitutional objections and to require the district court to call witnesses when a fair resolution of the facts is not otherwise possible.

The Court's unwillingness to construe the relevant provision in this fashion may be attributable to an understandable desire to minimize existing burdens on federal district judges, burdens that may seem especially unnecessary with respect to the gathering and evaluation of the facts. But the replacement of Art. III judges with magistrates, even if the replacement extends only to the finding of facts, erodes principles that strike near the heart of the constitutional order. In such contexts considerations of administrative cost are least forceful, and the Court must be most wary lest principles that were meant to endure be sacrificed to expediency. I would affirm the decision of the Court of Appeals.

Syllabus

SUN SHIP, INC. *v.* PENNSYLVANIA ET AL.

APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 79-343. Argued April 14, 1980—Decided June 23, 1980

Held: A State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (Act), as amended in 1972. Pp. 717–726.

(a) Under the law governing jurisdiction over marine-related injuries before 1972, nonlocal maritime injuries fell under the Act, "maritime but local" injuries "upon the navigable waters of the United States," 33 U. S. C. § 903 (a), could be compensated either under the Act or under state law, and injuries suffered beyond navigable waters—albeit within the range of federal admiralty jurisdiction—were remediable only under state law. Cf. *Davis* v. *Department of Labor*, 317 U. S. 249; *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114; *Nacirema Operating Co.* v. *Johnson*, 396 U. S. 212. Pp. 717–719.

(b) The extension of federal jurisdiction landward beyond the shoreline of the navigable waters of the United States under the 1972 amendments of the Act supplements, rather than supplants, state compensation law. The language of the 1972 amendments cannot fairly be understood as pre-empting state workers' remedies from the field of the Act, and thereby resurrecting the jurisdictional monstrosity that existed before the clarifying opinions in *Davis*, *supra*, and *Calbeck*, *supra*. Nor does the legislative history suggest a congressional decision to exclude state laws from the terrain newly occupied by the post–1972 Act. Pp. 719–722.

(c) The disparities which Congress had in view in amending the Act lay primarily in the paucity of relief under *state* compensation laws, and concurrent jurisdiction for state and federal compensation laws is not inconsistent with the amendments' policy of raising awards to a federal minimum. Even though, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system, there is no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits, the *quid pro quo* to employers for the 1972 landward extension of the Act being simply the abolition of the longshoremen's unseaworthiness remedy. Nor does the bare fact that the federal and state com-

pensation systems are different give rise to a conflict that, from the employer's standpoint, necessitates exclusivity for each system within a separate sphere, since, even were the Act exclusive within its field, many employers would be compelled to abide by state-imposed responsibilities lest a claim fall beyond the Act's scope. Pp. 723–726.

41 Pa. Commw. 302, 398 A. 2d 1111, affirmed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Jeffery C. Hayes argued the cause for appellant. With him on the briefs was *Thomas E. Zemaitis.*

Joseph Lurie argued the cause and filed a brief for appellees.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The single question presented by these consolidated cases is whether a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972. 33 U. S. C. §§ 901–950. We hold that it may.

I

The individual appellees are five employees of appellant Sun Ship, Inc., a shipbuilding and ship repair enterprise located on the Delaware River, a navigable water of the United States in Pennsylvania. Each employee was injured after the effective date of the 1972 amendments to the LHWCA while involved in shipbuilding or ship repair activities. Although the LHWCA applied to the injuries sustained, each appellee filed claims for benefits under the Pennsylvania Workmen's Compensation Act with state authorities. Appellant contended that the federal compensation statute was the employees' exclusive remedy. In upholding awards to

*Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Deputy Solicitor General Geller, Laurie M. Streeter,* and *Joshua T. Gillelan II* for the United States; and by *Patrick N. McTeague* for Local No. 6, Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO.

each appellee,[1] the Pennsylvania Workmen's Compensation Appeal Board ruled that the LHWCA did not pre-empt state compensation laws. The Commonwealth Court affirmed, and the Supreme Court of Pennsylvania denied petitions for allowance of appeal. We noted probable jurisdiction, 444 U. S. 1011 (1980), and affirm.

II

The evolution of the law of compensation for workers injured in maritime precincts is familiar. In 1917, *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, declared that States were constitutionally barred from applying their compensation systems to maritime injuries, and thus interfering with the overriding federal policy of a uniform maritime law. Subsequent decisions invalidated congressional efforts to delegate compensatory authority to the States within this national maritime sphere. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920); *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219 (1924). At the same time, the Court began to narrow the *Jensen* doctrine by identifying circumstances in which the subject of litigation might be maritime yet "local in character," and thus amenable to relief under state law. *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 (1921); *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469 (1922). And, in 1927, Congress was finally successful in extending a measure of protection to marine workers excluded by *Jensen* by enacting a federal compensation law—the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.* That statute provided, in pertinent part, that "[c]ompensation shall be payable [for an injury] . . . occurring upon the navigable waters of the United States . . . if recovery . . .

[1] Initially referees heard each of the claims. Four referees granted compensation, rejecting appellant's pre-emption argument. The referee in appellee Fields' case determined that a compensable injury had been inflicted, but agreed with appellant's jurisdictional contention, and dismissed the case.

through workmen's compensation proceedings may not validly be provided by State law." 44 Stat. 1426.

Federal and state law were thus linked together to provide theoretically complete coverage for maritime laborers. But the boundary at which state remedies gave way to federal remedies was far from obvious in individual cases. As a result, the injured worker was compelled to make a jurisdictional guess before filing a claim; the price of error was unnecessary expense and possible foreclosure from the proper forum by statute of limitations. *Davis* v. *Department of Labor*, 317 U. S. 249, 254 (1942). After a decade and a half during which there had not been formulated "any guiding, definite rule to determine the extent of state power in advance of litigation," *id.*, at 253, the Court determined that the border between federal and state compensation schemes was less a line than a "twilight zone," in which "employees must have their rights determined case by case . . . ," *id.*, at 256. Within this zone, *Davis* effectively established a regime of concurrent jurisdiction.

Calbeck v. *Travelers Insurance Co.*, 370 U. S. 114 (1962), further overlapped federal and state-law coverage for marine workers. *Calbeck* held that the LHWCA comprehended "all injuries sustained by employees on navigable waters," *id.*, at 124, without regard to whether the locus of an event was "maritime but local," and hence within the scope of state compensation provisions. We interpreted the statutory phrase "if recovery . . . may not validly be provided by State law" to mean that the LHWCA would

> "reac[h] all those cases of injury to employees on navigable waters as to which *Jensen*, *Knickerbocker* and *Dawson* had rendered questionable the availability of a state compensation remedy . . . [,] whether or not a particular one was also within the constitutional reach of a state workmen's compensation law." *Id.*, at 126–127.

Yet having extended the LHWCA into the "maritime but local" zone, *Calbeck* did not overturn *Davis* by treating the

federal statute as exclusive. To the contrary, *Calbeck* relied upon *Davis*, and discussed at length its proposition that an injury within the "maritime but local" sphere might be compensated under either state or federal law. 370 U. S., at 128–129. So, too, *Calbeck*'s explanation of *Avondale Marine Ways, Inc.* v. *Henderson*, 346 U. S. 366 (1953), indicated that although an injury might be compensable under the Longshoremen's Act, "there is little doubt that a state compensation act could validly have been applied to it." 370 U. S., at 129. Even more significantly, *Calbeck*'s ruling that one of the employees in a consolidated case should not be held to have elected to pursue state remedies was necessarily premised upon the view that state relief was concurrently available. *Id.*, at 131–132; see also *Nacirema Co.* v. *Johnson*, 396 U. S. 212, 220–221 (1969); *Nations* v. *Morris*, 483 F. 2d 577 (CA5 1973) (Brown, C. J.).

Before 1972, then, marine-related injuries fell within one of three jurisdictional spheres as they moved landward. At the furthest extreme, *Jensen* commanded that nonlocal maritime injuries fall under the LHWCA. "Maritime but local" injuries "upon the navigable waters of the United States," 33 U. S. C. § 903 (a), could be compensated under the LHWCA or under state law. And injuries suffered beyond navigable waters—albeit within the range of federal admiralty jurisdiction—were remediable only under state law. *Nacirema Co.* v. *Johnson*, *supra*.

III

In 1972, Congress superseded *Nacirema Co.* v. *Johnson* by extending the LHWCA landward beyond the shoreline of the navigable waters of the United States. Pub. L. 92–576, 86 Stat. 1251, amending 33 U. S. C. § 903 (a). In so doing, the Longshoremen's Act became, for the first time, a source of relief for injuries which had always been viewed as the province of state compensation law.

Absent any contradicting signal from Congress, the principles of *Davis* v. *Department of Labor*, *supra*, and of *Calbeck*

v. *Travelers Insurance Co., supra,* direct the conclusion that the 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law. Given that the pre-1972 Longshoremen's Act ran concurrently with state remedies in the "maritime but local" zone, it follows that the post-1972 expansion of the Act landward would be concurrent as well. For state regulation of worker injuries is even more clearly appropriate ashore than it is upon navigable waters. Compare *State Industrial Comm'n* v. *Nordenholt Corp.,* 259 U. S. 263 (1922), with *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205 (1917). Furthermore, the "jurisdictional dilemma," *Davis, supra,* at 255, that results when employees must claim relief under one of two exclusive compensation schemes is as acute when the jurisdictional boundary between schemes is fixed upon land, as it is when the line is drawn between two maritime spheres. To read the 1972 amendments as compelling laborers to seek relief under two mutually exclusive remedial systems wou'd lead to the prejudicial consequences which we described in *Davis* as

> "defeat[ing] the purpose of the federal act, which seeks to give 'to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation,' and the state Acts . . . which ai[m] at 'sure and certain relief for workmen.'" 317 U. S., at 254.

See *Calbeck, supra,* at 126.

The language of the 1972 amendments cannot fairly be understood as pre-empting state workers' remedies from the field of the LHWCA, and thereby resurrecting the jurisdictional monstrosity that existed before the clarifying opinions in *Davis* and *Calbeck.* Appellant focuses our attention upon the deletion from amended § 903 (a) of the phrase: "[i]f recovery . . . through workmen's compensation proceedings may not validly be provided by State law." But, if anything, that change reinforces our previous interpretation of that sec-

tion as contemplating concurrent jurisdiction. *Calbeck*, 370 U. S., at 126. For it was that reference to state law which provided the strongest (although ultimately unsuccessful) argument for reading the pre-1972 § 903 (a) as an exclusive jurisdictional provision. *Calbeck, supra,* at 132 (STEWART, J., dissenting). Whether Congress accepted *Calbeck*'s view that the state-law clause was *consonant* with concurrent jurisdiction, or the dissenters' construction of the clause as *inconsistent* with concurrent jurisdiction, the deletion of that language in 1972—if it indicates anything—may logically only imply acquiescence in *Calbeck*'s conclusion that the LHWCA operates within the same ambit as state workers' remedies.[2] It would be a *tour de force* of statutory misinterpretation to treat the *removal* of phrasing that arguably establishes exclusive jurisdiction as manifesting the intent to command such exclusivity.

Nor does the legislative history suggest a congressional decision to exclude state laws from the terrain newly occupied by the post-1972 Longshoremen's Act. Appellant can draw little support from general expressions of intent to alleviate unjust disparities in recovery conditioned upon the location of marine laborers at the time of an accident; as Part IV, *infra,* demonstrates, concurrency of jurisdiction in no way undercuts that commendable policy. And appellant is not much assisted by fixing upon the sentence in the bill Reports that declares:

> "It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a

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[2] If Congress joined in *Calbeck*'s understanding that the phrase underscored the LHWCA's application where state-law compensability had been drawn into question by *Jensen*, then the striking of the language may be explained on the ground of its superfluity once Congress had pushed the federal Act landward beyond the *Jensen* line. If the Court took the dissenters' position that the state-law clause imposed jurisdictional exclusivity, then its deletion indicates repeal of any such exclusivity. Finally, Congress may simply have endeavored to reaffirm the correctness of the *Calbeck* result by removing possibly contradictory language.

> substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, *if State laws are permitted to continue to apply to injuries occurring on land.*" S. Rep. No. 92–1125, p. 13 (1972); H. R. Rep. No. 92–1441, p. 10 (1972) (emphasis added).

That statement likely means only that state laws should not be permitted to apply *exclusively* to injuries occurring upon land; the "substantial disparity in benefits" that troubled Congress is eliminated once federal law provides a concurrent or supplementary route to compensation. And, in any event, as Professors Gilmore and Black have noted, "the statement does not appear to be entitled to much weight," since the "part of the Committee Report which is devoted to the shoreward extension of LH[W]CA coverage does not so much as mention the pre-1972 case law on 'maritime but local' and the 'twilight zone.' . . ." G. Gilmore & C. Black, The Law of Admiralty 425 (2d ed. 1975) (hereafter Gilmore & Black).[3] In particular, there is no intimation of intent to overrule *Davis* and *Calbeck*—a significant omission in light of the care which the Reports elsewhere take in identifying the Supreme Court cases to be overturned by the abolition of longshoremen's actions for unseaworthiness. See S. Rep. No. 92–1125, *supra*, at 8–12; H. R. Rep. No. 92–1441, *supra*, at 4–8; Gilmore & Black 425.

We therefore find no sign in the 1972 amendments to the LHWCA that Congress wished to alter the accepted understanding that federal jurisdiction would coexist with state compensation laws in that field in which the latter may constitutionally operate under the *Jensen* doctrine.[4]

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[3] "It may be that the writer of the Report mistakenly assumed that the LH[W]CA had always provided the exclusive compensation remedy for injuries which occurred on navigable waters and consequently assumed that it would also be exclusive with respect to the land injuries newly covered by the amendments." Gilmore & Black 425.

[4] Appellant also argues that a mandate for exclusive jurisdiction may be

IV

Appellant vigorously contends, nevertheless, that jurisdictional exclusivity is—in "fact" or in "law"—implied in the LHWCA. Pointing to declarations of congressional policy to eliminate disparities in compensation to marine workers depending on whether they were injured on land or over water, S. Rep. No. 92–1125, *supra*, at 12–13; H. R. Rep. No. 92–1441, *supra*, at 10–11, appellant urges that concurrent remedial jurisdiction on land would defeat the uniformity principle underlying the statute.

As the Reports make clear, the disparities which Congress had in view in amending the LHWCA lay primarily in the paucity of relief under *state* compensation laws.[5] The thrust of the amendments was to "upgrade the benefits." S. Rep. No. 92–1125, *supra*, at 1; see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 261–262 (1977). Concurrent jurisdiction for state and federal compensation laws is in no way inconsistent with this policy of raising awards to a federal

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discerned in 33 U. S. C. § 905 (a), which provides in pertinent part that "[t]he liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee. . . ." Since that provision predates the 1972 amendments, however, appellant's interpretation would also discredit our previous decisions in *Davis* v. *Department of Labor*, 317 U. S. 249 (1942), and *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114 (1962). In fact, *Calbeck* upheld an award under the LHWCA against which had been credited payments made under the aegis of a state compensation statute; we noted that 33 U. S. C. § 905 was "not involved in this case," 370 U. S., at 132, n. 16. Thus, we did not construe § 905 (a) to exclude remedies offered by other jurisdictions. See Gilmore & Black 432–433, and n. 335d; cf. *Industrial Comm'n* v. *McCartin*, 330 U. S. 622 (1947). The 1972 amendments signify no rejection of this interpretation.

[5] "To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits. . . ." S. Rep. No. 92–1125, p. 12 (1972); H. R. Rep. No. 92–1441, p. 10 (1972).

minimum. When laborers file claims under the LHWCA, they are compensated under federal standards. And workers who commence their actions under state law will generally be able to make up the difference between state and federal benefit levels by seeking relief under the Longshoremen's Act, if the latter applies.[6]

To be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system.[7] But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits. Rather, it seems that the *quid pro quo* to the employers for the landward extension of the LHWCA by the 1972 amendments was simply abolition of the longshoremen's unseaworthiness remedy. See S. Rep. No. 92–1125, *supra*, at 4–5; H. R. Rep. No. 92–1441, *supra*, at 1; *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, at 261–262. Indeed, it is noteworthy that in their discussion of advantages to employers under the 1972 amendments, the bill Reports dwell upon the rejection of the

[6] Most often, state workmen's compensation laws will not be treated as making awards thereunder final or conclusive. See *Calbeck* v. *Travelers Insurance Co.*, *supra*, at 131–132; *Industrial Comm'n* v. *McCartin*, *supra*; Gilmore & Black 431–433; 4 A. Larson, Law of Workmen's Compensation §§ 85.20, 89.53 (a) and (b) (1979); Larson, The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts, 45 S. Cal. L. Rev. 699, 729–730 (1972). Admittedly, if a particular state compensation law provision does indisputably declare its awards final, a conflict with the LHWCA may possibly arise where a claimant seeks inferior state benefits in the first instance. But the consequences to the claimant of this error would be less drastic than those of a mistake under the rule appellant contemplates—under which a misstep could result in no benefits. At any rate, although the question is not directly before us, we observe that if federal preclusion ever need be implied to cope with this remote contingency, a less disruptive approach would be to pre-empt the state compensation exclusivity clause, rather than to pre-empt the entire state compensation statute as appellant suggests.

[7] But this situation will be exceedingly rare. See 4 A. Larson, Law of Workmen's Compensation, *supra*, § 89.27, at 16–180.

unseaworthiness action, and do not mention pre-emption of state remedies. See S. Rep. No. 92–1125, *supra*, at 4–5; H. R. Rep. No. 92–1441, *supra*, at 1.

Finally, we are not persuaded that the bare fact that the federal and state compensation systems are different gives rise to a conflict that, from the employer's standpoint, necessitates exclusivity for each compensation system within a separate sphere. Mandating exclusive jurisdiction will not relieve employers of their distinct obligations under state and federal compensation law. The line that circumscribes the jurisdictional compass of the LHWCA—a compound of "status" and "situs"—is no less vague than its counterpart in the pre-"twilight zone" *Jensen* era. See generally *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69 (1980); *Northeast Marine Terminal Co.* v. *Caputo*, *supra*; Gilmore & Black 424, 428–430; 4 A. Larson, Law of Workmen's Compensation § 89.70, p. 16–283 (1979). Thus, even were the LHWCA exclusive within its field, many employers would be compelled to abide by state-imposed responsibilities lest a claim fall beyond the scope of the LHWCA.[8] Our observation about exclusive jurisdiction in *Davis* v. *Department of Labor* is apt whether jurisdictional barriers are erected on land or at the water's edge: "The horns of the jurisdictional dilemma press as sharply on employers as on employees." 317 U. S., at 255.

Of one thing we may be certain. The exclusivity rule which appellant urges upon us would thrust employees into the same jurisdictional peril from which they were rescued by *Davis* and *Calbeck* v. *Travelers Insurance Co.* See Gilmore & Black 425.[9] The legislative policy animating the LHWCA's land-

[8] See also Larson, 45 S. Cal. L. Rev., *supra*, at 736–737.

Of course, there is no danger of double recovery under concurrent jurisdiction since employers' awards under one compensation scheme would be credited against any recovery under the second scheme. See, *e. g.*, *Calbeck* v. *Travelers Insurance Co.*, *supra*, at 131.

[9] "Indeed a theory of concurrent jurisdiction . . . seems to be the only sensible way of dealing with state and federal statutes which meet at some vaguely defined line." Gilmore & Black 425.

ward shift was remedial; the amendments' framers acted out of solicitude for the workers. See *P. C. Pfeiffer Co., supra,* at 74–75; *Northeast Marine Terminal Co.,* 432 U. S., at 268. To adopt appellant's position, then, would blunt the thrust of the 1972 amendments, and frustrate Congress' intent to aid injured maritime laborers. We decline to do so in the name of "uniformity."

Accordingly, we affirm.

It is so ordered.

UNITED STATES *v.* PAYNER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78–1729. Argued February 20, 1980—Decided June 23, 1980

At respondent's nonjury trial for falsifying a federal income tax return by denying that he maintained a foreign bank account, respondent moved to suppress a loan guarantee agreement in which he pledged the funds in the bank account as security. The District Court found respondent guilty on the basis of all the evidence, but then (1) found that the Government had discovered the guarantee agreement as the result of a flagrantly illegal search of a bank officer's briefcase, (2) suppressed all the Government's evidence except for respondent's tax return and related testimony, and (3) set aside the conviction for failure to demonstrate knowing falsification. The court held, *inter alia*, that, although the illegal search did not violate respondent's Fourth Amendment rights, the inherent supervisory power of the federal courts required it to exclude evidence tainted by the illegal search. The Court of Appeals affirmed.

Held:

1. Respondent lacks standing under the Fourth Amendment to suppress the documents illegally seized from the bank officer. A defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party, and respondent possessed no privacy interest in the documents seized in this case. Cf. *Rakas* v. *Illinois*, 439 U. S. 128; *United States* v. *Miller*, 425 U. S. 435. Pp. 731–733.

2. The supervisory power of the federal courts does not authorize a court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court. Under the Fourth Amendment, the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. And the values assigned to the competing interests of deterring illegal searches and of furnishing the trier of fact with all relevant evidence do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment. Such power does not extend so far as to confer on the judiciary discretionary power to dis-

regard the considered limitations of the law it is charged with enforcing. Pp. 733–737.

590 F. 2d 206, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 737. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 738.

Solicitor General McCree argued the cause for the United States. With him on the brief were *Assistant Attorney General Ferguson, Robert E. Lindsay,* and *James A. Bruton.*

Bennet Kleinman argued the cause for respondent. With him on the brief were *Bernard J. Stuplinski* and *Michael H. Diamant.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question is whether the District Court properly suppressed the fruits of an unlawful search that did not invade the respondent's Fourth Amendment rights.

I

Respondent Jack Payner was indicted in September 1976 on a charge of falsifying his 1972 federal income tax return in violation of 18 U. S. C. § 1001.[1] The indictment alleged that respondent denied maintaining a foreign bank account at a time when he knew that he had such an account at the Castle Bank and Trust Company of Nassau, Bahama Islands. The Government's case rested heavily on a loan guarantee agreement dated April 28, 1972, in which respondent pledged

[1] Title 18 U. S. C. § 1001 provides in relevant part:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

the funds in his Castle Bank account as security for a $100,000 loan.

Respondent waived his right to jury trial and moved to suppress the guarantee agreement. With the consent of the parties, the United States District Court for the Northern District of Ohio took evidence on the motion at a hearing consolidated with the trial on the merits. The court found respondent guilty as charged on the basis of all the evidence. The court also found, however, that the Government discovered the guarantee agreement by exploiting a flagrantly illegal search that occurred on January 15, 1973. The court therefore suppressed "all evidence introduced in the case by the Government with the exception of Jack Payner's 1972 tax return . . . and the related testimony." 434 F. Supp. 113, 136 (1977). As the tax return alone was insufficient to demonstrate knowing falsification, the District Court set aside respondent's conviction.[2]

The events leading up to the 1973 search are not in dispute. In 1965, the Internal Revenue Service launched an investigation into the financial activities of American citizens in the Bahamas. The project, known as "Operation Trade Winds," was headquartered in Jacksonville, Fla. Suspicion focused on the Castle Bank in 1972, when investigators learned that a suspected narcotics trafficker had an account there. Special Agent Richard Jaffe of the Jacksonville office asked Norman Casper, a private investigator and occasional informant, to learn what he could about the Castle Bank and its depositors. To that end, Casper cultivated his friendship with Castle

[2] The unusual sequence of rulings was a byproduct of the consolidated hearing conducted by the District Court. The court initially failed to enter judgment on the merits. At the close of the evidence, it simply granted respondent's motion to suppress. After the Court of Appeals for the Sixth Circuit dismissed the Government's appeal for want of jurisdiction, the District Court vacated the order granting the motion to suppress and entered a verdict of guilty. The court then reinstated its suppression order and set aside the verdict. Respondent does not challenge these procedures.

Bank vice president Michael Wolstencroft. Casper introduced Wolstencroft to Sybol Kennedy, a private investigator and former employee. When Casper discovered that the banker intended to spend a few days in Miami in January 1973, he devised a scheme to gain access to the bank records he knew Wolstencroft would be carrying in his briefcase. Agent Jaffe approved the basic outline of the plan.

Wolstencroft arrived in Miami on January 15 and went directly to Kennedy's apartment. At about 7:30 p. m., the two left for dinner at a Key Biscayne restaurant. Shortly thereafter, Casper entered the apartment using a key supplied by Kennedy. He removed the briefcase and delivered it to Jaffe. While the agent supervised the copying of approximately 400 documents taken from the briefcase, a "lookout" observed Kennedy and Wolstencroft at dinner. The observer notified Casper when the pair left the restaurant, and the briefcase was replaced. The documents photographed that evening included papers evidencing a close working relationship between the Castle Bank and the Bank of Perrine, Fla. Subpoenas issued to the Bank of Perrine ultimately uncovered the loan guarantee agreement at issue in this case.

The District Court found that the United States, acting through Jaffe, "knowingly and willfully participated in the unlawful seizure of Michael Wolstencroft's briefcase. . . ." *Id.*, at 120. According to that court, "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties. . . ." *Id.*, at 132–133. The District Court also found that the documents seized from Wolstencroft provided the leads that ultimately led to the discovery of the critical loan guarantee agreement. *Id.*, at 123.[3] Although the search did not impinge upon the

[3] The United States argued in the District Court and the Court of Appeals that the guarantee agreement was discovered through an independent investigation untainted by the briefcase search. The Government also

respondent's Fourth Amendment rights, the District Court believed that the Due Process Clause of the Fifth Amendment and the inherent supervisory power of the federal courts required it to exclude evidence tainted by the Government's "knowing and purposeful *bad faith hostility* to any person's fundamental constitutional rights." *Id.*, at 129; see *id.*, at 133, 134–135.

The Court of Appeals for the Sixth Circuit affirmed in a brief order endorsing the District Court's use of its supervisory power. 590 F. 2d 206 (1979) (*per curiam*). The Court of Appeals did not decide the due process question. We granted certiorari, 444 U. S. 822 (1979), and we now reverse.

II

This Court discussed the doctrine of "standing to invoke the [Fourth Amendment] exclusionary rule" in some detail last Term. *Rakas* v. *Illinois*, 439 U. S. 128, 138 (1978). We reaffirmed the established rule that a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights. *Id.*, at 133–140. See, *e. g.*, *Brown* v. *United States*, 411 U. S. 223, 229–230 (1973); *Alderman* v. *United States*, 394 U. S. 165, 171–172 (1969); *Simmons* v. *United States*, 390 U. S. 377, 389 (1968). And the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party. *Rakas* v. *Illinois*, 439 U. S., at 143; *id.*, at 149–152 (POWELL, J., concurring); *Combs* v. *United States*, 408 U. S. 224, 227 (1972); *Mancusi* v. *DeForte*, 392 U. S. 364, 368 (1968).

The foregoing authorities establish, as the District Court recognized, that respondent lacks standing under the Fourth

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denied that its agents willfully encouraged Casper's illegal behavior. For purposes of this opinion, we need not question the District Court's contrary findings on either point.

Amendment to suppress the documents illegally seized from Wolstencroft. 434 F. Supp., at 126. The Court of Appeals did not disturb the District Court's conclusion that "Jack Payner possessed no privacy interest in the Castle Bank documents that were seized from Wolstencroft." *Ibid.*; see 590 F. 2d, at 207. Nor do we. *United States* v. *Miller*, 425 U. S. 435 (1976), established that a depositor has no expectation of privacy and thus no "protectable Fourth Amendment interest" in copies of checks and deposit slips retained by his bank. *Id.*, at 437; see *id.*, at 442. Nothing in the record supports a contrary conclusion in this case.[4]

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[4] We are not persuaded by respondent's suggestion that the Bahamian law of bank secrecy creates an expectation of privacy not present in *United States* v. *Miller*, 425 U. S. 435 (1976). At the outset, it is not clear that secret information regarding this respondent's account played any role in the investigation that led to the discovery of the critical loan guarantee agreement. See *supra*, at 730. Even if the causal link were established, however, respondent's claim lacks merit. He cites a provision, 1909 Bah. Acts, ch. 4, that is no longer in effect. Bank secrecy is now safeguarded by § 19 of the Banks Act, Bah. Islands Rev. Laws, ch. 96 (1965), as added, 1965 Bah. Acts, No. 65, which provides in relevant part:

"(1) Except for the purpose of the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court of competent jurisdiction within the Colony or under the provisions of any law, no person shall disclose any information relating to the affairs of . . . the customer of a bank which he has acquired in the performance of his duties or the exercise of his functions under this Act."

See also the Banks and Trust Companies Regulation Act, 1965 Bah. Acts, No. 64, § 10, as amended, 1968 Bah. Acts, No. 34, 1969 Bah. Acts, No. 20, 1971 Bah. Acts, No. 15. The statute is hardly a blanket guarantee of privacy. Its application is limited; it is hedged with exceptions; and we have been directed to no authority construing its terms. Moreover, American depositors know that their own country requires them to report relationships with foreign financial institutions. 31 U. S. C. § 1121; 31 CFR § 103.24 (1979). See generally *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 59–63, 71–76 (1974). We conclude that respondent lacked a reasonable expectation of privacy in the Castle Bank records that documented his account.

The District Court and the Court of Appeals believed, however, that a federal court should use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights. The United States contends that this approach—as applied in this case—upsets the careful balance of interests embodied in the Fourth Amendment decisions of this Court. In the Government's view, such an extension of the supervisory power would enable federal courts to exercise a standardless discretion in their application of the exclusionary rule to enforce the Fourth Amendment. We agree with the Government.

III

We certainly can understand the District Court's commendable desire to deter deliberate intrusions into the privacy of persons who are unlikely to become defendants in a criminal prosecution. See 434 F. Supp., at 135. No court should condone the unconstitutional and possibly criminal behavior of those who planned and executed this "briefcase caper." [5]

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[5] "The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed." *Alderman* v. *United States*, 394 U. S. 165, 175 (1969). We note that in 1976 Congress investigated the improprieties revealed in this record. See Oversight Hearings into the Operations of the IRS before a Subcommittee of the House Committee on Government Operations (Operation Tradewinds, Project Haven, and Narcotics Traffickers Tax Program), 94th Cong., 1st Sess. (1975). As a result, the Commissioner of Internal Revenue "called off" Operation Trade Winds. Tr. of Oral Arg. 35. The Commissioner also adopted guidelines that require agents to instruct informants on the requirements of the law and to report known illegalities to a supervisory officer, who is in turn directed to notify appropriate state authorities. IR Manual §§ 9373.3 (3), 9373.4 (Manual Transmittal 9–21, Dec. 27, 1977). Although these measures appear on their face to be less positive than one might expect from an agency charged with upholding the law, they do indicate disapproval of the practices found to have been implemented in this case. We cannot assume that similar lawless conduct, if brought to the attention of

Indeed, the decisions of this Court are replete with denunciations of willfully lawless activities undertaken in the name of law enforcement. *E. g., Jackson* v. *Denno,* 378 U. S. 368, 386 (1964); see *Olmstead* v. *United States,* 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting). But our cases also show that these unexceptional principles do not command the exclusion of evidence in every case of illegality. Instead, they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule.

Thus, the exclusionary rule "has been restricted to those areas where its remedial objectives are most efficaciously served." *United States* v. *Calandra,* 414 U. S. 338, 348 (1974). The Court has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case. *E. g., Rakas* v. *Illinois,* 439 U. S., at 137–138; *United States* v. *Ceccolini,* 435 U. S. 268, 275–279 (1978); *Stone* v. *Powell,* 428 U. S. 465, 489–491 (1976); see *Michigan* v. *Tucker,* 417 U. S. 433, 450–451 (1974).[6] Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. *E. g., Stone* v. *Powell, supra,* at 485–489; *United States* v. *Calandra, supra,* at 348. After all, it is the defendant, and not the constable, who stands trial.

The same societal interests are at risk when a criminal defendant invokes the supervisory power to suppress evidence seized in violation of a third party's constitutional rights. The supervisory power is applied with some caution even

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responsible officials, would not be dealt with appropriately. To require in addition the suppression of highly probative evidence in a trial against a third party would penalize society unnecessarily.

[6] See also *Kaufman* v. *United States,* 394 U. S. 217, 237–238 (1969) (Black, J., dissenting); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 736–746, 755–756 (1970).

when the defendant asserts a violation of his own rights.[7] In *United States* v. *Caceres*, 440 U. S. 741, 754–757 (1979), we refused to exclude all evidence tainted by violations of an executive department's rules. And in *Elkins* v. *United States*, 364 U. S. 206, 216 (1960), the Court called for a restrained application of the supervisory power.

> "[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice." *Ibid.*

See also *Nardone* v. *United States*, 308 U. S. 338, 340 (1939).

We conclude that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court. Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. *Rakas* v. *Illinois*, *supra*, at 137; *Alderman* v. *United States*, 394 U. S., at 174–175.[8]

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[7] Federal courts may use their supervisory power in some circumstances to exclude evidence taken from the *defendant* by "willful disobedience of law." *McNabb* v. *United States*, 318 U. S. 332, 345 (1943); see *Elkins* v. *United States*, 364 U. S. 206, 223 (1960); *Rea* v. *United States*, 350 U. S. 214, 216–217 (1956); cf. *Hampton* v. *United States*, 425 U. S. 484, 495 (1976) (POWELL, J., concurring in judgment). This Court has never held, however, that the supervisory power authorizes suppression of evidence obtained from third parties in violation of Constitution, statute, or rule. The supervisory power merely permits federal courts to supervise "the administration of criminal justice" among the parties before the bar. *McNabb* v. *United States*, *supra*, at 340.

[8] "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But

The values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment. In either case, the need to deter the underlying conduct and the detrimental impact of excluding the evidence remain precisely the same.

The District Court erred, therefore, when it concluded that

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we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U. S., at 174–175. See also *Stone* v. *Powell*, 428 U. S. 465, 488–489 (1976); *United States* v. *Calandra*, 414 U. S. 338, 348 (1974).

The dissent, *post*, at 746, urges that the balance of interests under the supervisory power differs from that considered in *Alderman* and like cases, because the supervisory power focuses upon the "need to protect the integrity of the federal courts." Although the District Court in this case relied upon a deterrent rationale, we agree that the supervisory power serves the "twofold" purpose of deterring illegality and protecting judicial integrity. See *post*, at 744. As the dissent recognizes, however, the Fourth Amendment exclusionary rule serves precisely the same purposes. *Ibid.*, citing, *inter alia*, *Dunaway* v. *New York*, 442 U. S. 200, 218 (1979), and *Mapp* v. *Ohio*, 367 U. S. 643, 659–660 (1961). Thus, the Fourth Amendment exclusionary rule, like the supervisory power, is applied in part "to protect the integrity of the *court*, rather than to vindicate the constitutional rights of the defendant. . . ." *Post*, at 747; see generally *Stone* v. *Powell*, *supra*, at 486; *United States* v. *Calandra*, *supra*, at 348.

In this case, where the illegal conduct did not violate the respondent's rights, the interest in preserving judicial integrity and in deterring such conduct is outweighed by the societal interest in presenting probative evidence to the trier to fact. See the first paragraph, *supra;* see also, *e. g.*, *Stone* v. *Powell*, *supra*, at 485–486. None of the cases cited by the dissent, *post*, at 744–745, supports a contrary view, since none of those cases involved criminal defendants who were not themselves the victims of the challenged practices. Thus, our decision today does not limit the traditional scope of the supervisory power in any way; nor does it render that power "superfluous." *Post*, at 748. We merely reject its use as a substitute for established Fourth Amendment doctrine.

"society's interest in deterring [bad faith] conduct by exclusion outweigh[s] society's interest in furnishing the trier of fact with all relevant evidence." 434 F. Supp., at 135. This reasoning, which the Court of Appeals affirmed, amounts to a substitution of individual judgment for the controlling decisions of this Court.[9] Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. We hold that the supervisory power does not extend so far.

The judgment of the Court of Appeals is

Reversed.

MR. CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion because Payner—whose guilt is not in doubt—cannot take advantage of the Government's violation of the constitutional rights of Wolstencroft, for he is not a party to this case. The Court's opinion makes clear the reason for that sound rule.

Orderly government under our system of separate powers calls for internal self-restraint and discipline in each Branch; this Court has no general supervisory authority over operations of the Executive Branch, as it has with respect to the federal courts. I agree fully with the Court that the exclusionary rule is inapplicable to a case of this kind, but the Court's holding should not be read as condoning the conduct

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[9] The same difficulty attends respondent's claim to the protections of the Due Process Clause of the Fifth Amendment. The Court of Appeals expressly declined to consider the Due Process Clause. But even if we assume that the unlawful briefcase search was so outrageous as to offend fundamental " 'canons of decency and fairness,' " *Rochin* v. *California*, 342 U. S. 165, 169 (1952), quoting *Malinski* v. *New York*, 324 U. S. 401, 417 (1945) (opinion of Frankfurter, J.), the fact remains that "[t]he limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the *defendant*," *Hampton* v. *United States*, *supra*, at 490 (plurality opinion).

of the IRS "private investigators" disclosed by this record, or as approval of their evidence-gathering methods.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

The Court today holds that a federal court is unable to exercise its supervisory powers to prevent the use of evidence in a criminal prosecution in that court, even though that evidence was obtained through intentional illegal and unconstitutional conduct by agents of the United States, because the defendant does not satisfy the standing requirement of the Fourth Amendment. That holding effectively turns the standing rules created by this Court for assertions of Fourth Amendment violations into a sword to be used by the Government to permit it deliberately to invade one person's Fourth Amendment rights in order to obtain evidence against another person. Unlike the Court, I do not believe that the federal courts are unable to protect the integrity of the judicial system from such gross Government misconduct.

I

The facts as found by the District Court need to be more fully stated in order to establish the level of purposeful misconduct to which agents of the United States have sunk in this case. Operation Trade Winds was initiated by the Internal Revenue Service (IRS) in 1965 to gather information about the financial activities of American citizens in the Bahamas. The investigation was supervised by Special Agent Richard Jaffe in the Jacksonville, Fla., office. It was not until June 1972 that the investigation focused on the Castle Bank and Trust Company of the Bahamas. In late October 1972 Jaffe asked one of his informants, Norman Casper, to obtain the names and addresses of the individuals holding accounts with the Castle Bank. Casper set to work soon thereafter. He was already an acquaintance of Michael Wol-

stencroft, vice president and trust officer of the Castle Bank. Casper knew that Wolstencroft frequently visited the United States carrying a briefcase with documents from the Castle Bank. Casper therefore introduced Wolstencroft to Sybol Kennedy, a private detective who worked for Casper. In early January 1973, Casper learned that Wolstencroft planned a business trip to the United States on January 15, 1973, and that he would have Castle Bank records with him on that trip. Plans for the "briefcase caper," as Casper called it, began in earnest.

As found by the District Court, Casper discussed the details of the plan with Jaffe on several occasions during the week before Wolstencroft's trip.[1] Casper told Jaffe that he could get the needed documents from Wolstencroft, but that Jaffe would have to supply photographic services. On January 11, Casper specifically informed Jaffe that he planned to enter an apartment and take Wolstencroft's briefcase. Jaffe then stated that he would have to clear the operation with his superior, Troy Register, Jr., Chief of the IRS Intelligence Division in Jacksonville. Clearance was obtained, and Jaffe told Casper to proceed with the plan.[2] Casper called Jaffe the following day and asked if the IRS could refer him to a locksmith who could be "trusted." Jaffe gave him such a referral.[3]

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[1] The Court rather blandly states that "Agent Jaffe approved the basic outline of the plan," *ante*, at 730. Such a characterization is misleading in light of the findings of the District Court. As is noted in the text *infra*, Jaffe knew explicit details of the operation in advance and helped to make the arrangements by recommending a locksmith who could be "trusted," by providing a safe and convenient location for the photographing of the documents, and by providing a photographer from the IRS.

[2] Jaffe testified in the District Court that "[w]hatever I knew, he [Register] knew." See 434 F. Supp. 113, 121, n. 40; Tr. 513.

[3] It was clear why Casper needed a locksmith who could be "trusted." Casper testified as follows in the District Court:

"Q. Isn't it a fact, Mr. Casper, you knew you were committing an illegal

The plans were finalized by the time of Wolstencroft's arrival on January 15. Wolstencroft went directly to Sybol Kennedy's apartment. The couple eventually went to a restaurant for dinner.[4] Using a key provided by Kennedy,[5] Casper entered the apartment and *stole* Wolstencroft's briefcase. Casper then rendezvoused with the IRS-recommended locksmith in a parking lot five blocks from the apartment; the locksmith made a key to fit the lock on the case. Casper took the briefcase and newly made key to the home of an IRS agent. Jaffe had selected that location for the photograph-

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act, and you wanted somebody who could be trusted to keep his mouth shut about it?

"A. There is that possibility, yes.

"Q. Isn't that the fact?

. . . . .

"A. Yes." 434 F. Supp., at 119, n. 20; Tr. 452–453.

It is interesting to note that even the locksmith who could be "trusted" refused to enter Kennedy's apartment with Casper. *Id.*, at 451.

The Government contends that when Agent Jaffe made the referral he did not know what use Casper intended to make of such a locksmith. Brief for United States 6, n. 4. The District Court found, however, that Jaffe already knew at the time of the referral that Casper intended to enter Kennedy's apartment and to take and open Wolstencroft's briefcase. There were, then, only two logical alternatives why Casper would want such a locksmith: to make a key to enter the briefcase, or to make a key to enter the apartment. Either way, Jaffe must have known that Casper's conduct was improper, and yet Jaffe made the referral anyway.

[4] It was not established at trial what occurred in Kennedy's apartment prior to the couple's departure for dinner. Since it was peculiarly within the power of the United States to produce Kennedy as a witness and since the Government did not explain her absence from the trial, the District Court inferred that Kennedy's testimony "would be unfavorable to the Government by further delineating the improprieties" of the "briefcase caper." 434 F. Supp., at 119, n. 22.

[5] The District Court, after hearing the testimony of both Casper and Jaffe, disbelieved Jaffe's assertion that Casper had informed him beforehand that Kennedy had given Casper a key with which to enter the apartment. See *id.*, at 119, n. 15, 121, n. 40. See also n. 3, *supra*.

ing because it was only eight blocks from the parking lot where Casper met the locksmith and Jaffe knew there was a need to act with haste.[6] The briefcase was opened in Jaffe's presence. Jaffe, Casper, and an IRS photography expert then photographed over 400 documents.[7] Casper had arranged for Kennedy and Wolstencroft to be watched on their date, and this lookout called Casper at the IRS agent's home when the couple finished their dinner. After all the documents had been copied, Casper relocked the briefcase and returned it to Kennedy's apartment. The entire "caper" lasted approximately one and one-half hours.

The illegalities of agents of the United States did not stop even at that point, however. During the following two weeks, Jaffe told Casper that the IRS needed additional information. Casper therefore sent Kennedy to visit Wolstencroft in the Bahamas. While there, acting pursuant to Casper's instructions, Kennedy stole a rolodex file from Wolstencroft's office. This file was turned over to Jaffe, who testified in the District Court that he had not cared how the rolodex file had been obtained.[8]

The IRS paid Casper $8,000 in cash for the services he rendered in obtaining the information about Castle Bank. Casper in turn paid approximately $1,000 of this money to Kennedy for her role in the "briefcase caper" and the theft of the rolodex file.

The "briefcase caper" revealed papers which showed a close relationship between the Castle Bank and a Florida bank.

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[6] 434 F. Supp., at 120, n. 25; Tr. 494–496.

[7] As noted previously, Casper had told Jaffe to provide the photographic equipment. Jaffe testified that one of the cameras used was a "microfilmer" which was "much quicker" than a regular camera. This camera had been brought by the IRS because "Casper had to get the documents and the briefcase back to the apartment prior to the return of the owner." *Id.*, at 493–495. This testimony again shows that Jaffe was fully aware in advance that the activities of the evening were improper.

[8] See 434 F. Supp., at 120, and n. 34; Tr. 501.

Subpoenas issued to that Florida bank resulted in the uncovering of the loan guarantee agreement which was the principal piece of evidence against respondent at trial. It is that loan agreement and the evidence discovered as a result of it that the District Court reluctantly [9] suppressed under the Due Process Clause of the Fifth Amendment and under its supervisory powers.

The District Court made several key findings concerning the level of misconduct of agents of the United States in these activities. The District Court found that "the United States, through its agents, Richard Jaffe, and others, knowingly and willfully participated in the unlawful seizure of Michael Wolstencroft's briefcase, and encouraged its informant, Norman Casper, to arrange the theft of a rolodex from the offices of Castle Bank." 434 F. Supp. 113, 120–121 (ND Ohio 1977) (footnotes omitted). The District Court concluded that "the United States was an active participant in the admittedly criminal conduct in which Casper engaged. . . ." *Id.*, at 121. The District Court found that "the illegal conduct of the government officials involved in this case compels the conclusion that they knowingly and purposefully obtained the briefcase materials with *bad faith hostility* toward the strictures imposed on their activities by the Constitution." *Id.*, at 130 (footnote omitted) (emphasis in original). The District Court considered the actions of Jaffe and Casper "outrageous," *ibid.*, because they "plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal." *Ibid.*

The most disturbing finding by the District Court, however, related to the intentional manipulation of the standing requirements of the Fourth Amendment by agents of the United States, who are, of course, supposed to uphold and

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[9] See 434 F. Supp., at 124, 129, 134, n. 74.

enforce the Constitution and laws of this country. The District Court found:

> "It is evident that the Government and its agents, including Richard Jaffe, were, and are, well aware that under the standing requirement of the Fourth Amendment, evidence obtained from a party pursuant to an unconstitutional search is admissible against third parties who's [*sic*] own privacy expectations are not subject to the search, even though the cause for the unconstitutional search was to obtain evidence incriminating those third parties. This Court finds that, in its desire to apprehend tax evaders, a desire the Court fully shares, the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel. Such governmental conduct compels the conclusion that Jaffe and Casper transacted the 'briefcase caper' with a purposeful, bad faith hostility toward the Fourth Amendment rights of Wolstencroft in order to obtain evidence against persons like Payner." *Id.*, at 131–133 (footnotes omitted).

The Court of Appeals did not disturb any of these findings. 590 F. 2d 206 (CA6 1979) (*per curiam*). Nor does the Court today purport to set them aside. See *ante*, at 730–731, n. 3. But cf. *ante*, at 733–734, n. 5. It is in the context of these findings—intentional illegal actions by Government agents taken in bad-faith hostility toward the constitutional rights of Wolstencroft for the purpose of obtaining evidence against persons such as the respondent through manipulation of the standing requirements of the Fourth Amendment—that the suppression issue must be considered.

II

This Court has on several occasions exercised its supervisory powers over the federal judicial system in order to suppress evidence that the Government obtained through misconduct. See, *e. g.*, *McNabb* v. *United States*, 318 U. S. 332 (1943); *Upshaw* v. *United States*, 335 U. S. 410 (1948); *Mesarosh* v. *United States*, 352 U. S. 1 (1956); *Mallory* v. *United States*, 354 U. S. 449 (1957); *Elkins* v. *United States*, 364 U. S. 206 (1960). Cf. *Rea* v. *United States*, 350 U. S. 214 (1956) (supervisory powers used to enjoin federal agent from testifying in state criminal prosecution concerning illegal search and from turning over to the State evidence illegally seized). The rationale for such suppression of evidence is twofold: to deter illegal conduct by Government officials, and to protect the integrity of the federal courts. *McNabb* v. *United States*, *supra*, at 342, 345, 347; *Mesarosh* v. *United States*, *supra*, at 14; *Elkins* v. *United States*, *supra*, at 217, 222–223. Cf. *Mapp* v. *Ohio*, 367 U. S. 643, 659–660 (1961) (Fourth and Fourteenth Amendments); *Brown* v. *Illinois*, 422 U. S. 590, 599–600 (1975) (Fourth and Fourteenth Amendments); *Dunaway* v. *New York*, 442 U. S. 200, 218 (1979) (Fourth and Fourteenth Amendments). The Court has particularly stressed the need to use supervisory powers to prevent the federal courts from becoming accomplices to such misconduct. See, *e. g.*, *McNabb* v. *United States*, *supra*, at 345 ("Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law"); *Mesarosh* v. *United States*, *supra*, at 14 (the Court should use its supervisory powers in federal criminal cases "to see that the waters of justice are not polluted"); *Elkins* v. *United States*, *supra*, at 223 (federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold").

The need to use the Court's supervisory powers to suppress evidence obtained through governmental misconduct was perhaps best expressed by Mr. Justice Brandeis in his famous dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, 471–485 (1928):

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Id.*, at 485.

Mr. Justice Brandeis noted that "a court will not redress a wrong when he who invokes its aid has unclean hands," *id.*, at 483, and that in keeping with that principle the court should not lend its aid in the enforcement of the criminal law when the government itself was guilty of misconduct. "Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination." *Id.*, at 484. See also *id.*, at 469–471 (Holmes, J., dissenting); *id.*, at 488 (Stone, J., dissenting); *Lopez* v. *United States*, 373 U. S. 427, 453, n. 3 (1963) (BRENNAN, J., dissenting).[10]

[10] The Court's opinion inexplicably ignores this basic thrust of our prior supervisory powers cases, and instead implies that the only value served

The reason for this emphasis on the need to protect the integrity of the federal courts through the use of supervisory powers can be derived from the factual contexts in which supervisory powers have been exercised. In large part when supervisory powers have been invoked the Court has been faced with intentional illegal conduct. It has not been the case that "[t]he criminal is to go free because the constable has blundered," *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926). In these cases there has been no "blunder" by the Government agent at all; rather, the agent has intentionally violated the law for the explicit purpose of obtaining the evidence in question. Cf. *Lopez* v. *United States*, *supra*, at 440 (supervisory powers should be exercised only if there has been "manifestly improper conduct by federal officials"). If the federal court permits such evidence, the intended product of deliberately illegal Government action, to be used to obtain a conviction, it places its imprimatur upon such lawlessness and thereby taints its own integrity.

The present case falls within that category. The District Court found, and the record establishes, a deliberate decision by Government agents to violate the constitutional rights of Wolstencroft for the explicit purpose of obtaining evidence against persons such as Payner. The actions of the Government agents—stealing the briefcase, opening it, and photographing all the documents inside—were both patently in violation of the Fourth Amendment rights of Wolstencroft [11] and plainly in violation of the criminal law.[12] The Govern-

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by suppression is deterrence of future misconduct. See *ante*, at 736. Deterrence is one purpose behind the suppression of evidence in such situations, but it is by no means the only one.

[11] The Government conceded below that Wolstencroft's Fourth Amendment rights had been violated. 434 F. Supp., at 126. See Tr. 502. See also Brief for United States in No. 78-5278 (CA6), p. 20. Cf. Tr. of Oral Arg. 14; Brief for United States 39. The Court agrees that the conduct was unconstitutional. *Ante*, at 733.

[12] The Court characterizes the actions of Jaffe and Casper in the brief-

ment knew exactly what information it wanted, and it was that information which was stolen from Wolstencroft. Similarly, the Government knew that it wanted to prosecute persons such as Payner, and it made a conscious decision to forgo any opportunity to prosecute Wolstencroft in order to obtain illegally the evidence against Payner and others.[13]

Since the supervisory powers are exercised to protect the integrity of the *court*, rather than to vindicate the constitutional rights of the defendant, it is hard to see why the Court today bases its analysis entirely on Fourth Amendment standing rules. The point is that the federal judiciary should not be made accomplices to the crimes of Casper, Jaffe, and others. The only way the IRS can benefit from the evidence it chose to obtain illegally is if the evidence is admitted at trial against persons such as Payner; that was the very point of the criminal exercise in the first place. If the IRS is permitted to obtain a conviction in federal court based almost entirely on that illegally obtained evidence and its fruits,

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case incident as "possibly criminal behavior," *ibid.* The District Court concluded that the actions of the IRS appeared to constitute a prima facie case of criminal larceny under Florida law, and possibly violated other criminal laws of that State as well. 434 F. Supp., at 130, n. 66. Casper admitted in the District Court that he knew he was committing an illegal act. Tr. 452–453. The stealing of the rolodex file from Wolstencroft's office was also both unconstitutional and criminal. That theft, however, produced no additional evidence against Payner. See 434 F. Supp., at 123, n. 56.

[13] See *id.*, at 129, n. 65, 131–133, and n. 69. See also Tr. 505.

Wolstencroft in fact was indicted for aiding and abetting Payner. Brief for United States 3, n. 2. However, Wolstencroft is a Bahamian resident, and did not return to the United States to answer the indictment. *Ibid.* The mere fact that the Government went through the steps of indicting Wolstencroft does not in any way undermine the District Court's finding, based on substantial evidence in the record, that Wolstencroft was never the target of the IRS investigation. In light of the Government's concession that Wolstencroft's Fourth Amendment rights were violated, it is hard to see how the banker could be successfully prosecuted on the aiding and abetting charge.

then the judiciary has given full effect to the deliberate wrongdoings of the Government. The federal court does indeed become the accomplice of the Government lawbreaker, an accessory after the fact, for without judicial use of the evidence the "caper" would have been for nought. Such a pollution of the federal courts should not be permitted.[14]

It is particularly disturbing that the Court today chooses to allow the IRS deliberately to manipulate the standing rules of the Fourth Amendment to achieve its ends. As previously noted, the District Court found that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, *and will act in the future,* according to that counsel." 434 F. Supp., at 132–133 (emphasis supplied). Whatever role those standing limitations may play, it is clear that they were never intended to be a sword to be used by the Government in its deliberate choice to sacrifice the constitutional rights of one person in order to prosecute another.

The Court's decision to engraft the standing limitations of the Fourth Amendment onto the exercise of supervisory powers is puzzling not only because it runs contrary to the major purpose behind the exercise of the supervisory powers—to protect the integrity of the court—but also because it appears to render the supervisory powers superfluous. In order to establish that suppression of evidence under the supervisory powers would be proper, the Court would also require

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[14] It is simply not a sufficient cure for the Court to denounce the actions of the IRS, ante, at 734, while at the same time rewarding the Government for this conduct by permitting the IRS to use the evidence in the very manner which was the purpose of the illegal and unconstitutional activities.

Payner to establish a violation of his Fourth or Fifth Amendment rights,[15] in which case suppression would flow directly from the Constitution. This approach is totally unfaithful to our prior supervisory powers cases, which, contrary to the Court's suggestion, are not constitutional cases in disguise.

I also do not understand the basis for the Court's assertion that this is not a case in which the District Court was supervising the administration of justice "among the parties before the bar," *ante*, at 735, n. 7, and therefore supervisory powers are inapplicable. Clearly the Government is before the bar. Equally clearly, the Government embarked on this deliberate pattern of lawless behavior for the express purpose of gaining evidence against persons such as Payner, so there can be

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[15] The Court appears to suggest that there can be no suppression of evidence based on a violation of the Due Process Clause in this case because it was not Payner who was the immediate victim of the Government's outrageous conduct. *Ante*, at 737, n. 9. Although the District Court concluded that the evidence should be suppressed under the Due Process Clause as well as under its supervisory powers, the Court of Appeals specifically did not reach that issue, 590 F. 2d 206 (CA6 1979) (*per curiam*), and the Government purposely did not raise the issue in this Court. See Pet. for Cert. 21, n. 13. The Court therefore should not reach out to address the issue in a footnote.

In addition, the only authority cited by the Court for its suggestion is *Hampton* v. *United States*, 425 U. S. 484, 490 (1976) (plurality opinion). *Hampton* was only a plurality opinion, and the issue for which the Court purports to cite it was not raised by the facts of that case. Similarly, in the Court of Appeals below the United States was able to cite only *Sims* v. *Georgia*, 389 U. S. 404, 407 (1967), a case plainly not on point, and the sentence from the *Hampton* plurality opinion quoted by the Court, *ante*, at 737, n. 9, for the proposition that Payner lacked standing to raise a due process argument. See Brief for United States in No. 78-5278 (CA6), pp. 21–22; Reply Brief for United States in No. 78-5278, p. 6. The issue whether the standing limitations this Court has imposed for challenging Fourth Amendment violations also apply for violations of the Due Process Clause based on outrageous Government conduct has not yet been settled by this Court. Cf. 434 F. Supp., at 129, n. 65, and authorities discussed therein. The due process issue should be left for consideration in the first instance by the Court of Appeals on remand.

no legitimate claim that the illegal actions are only tangentially related to the present prosecution. Instead, the Government misconduct is at the very heart of this case; without the evidence produced by the illegal conduct, there would have been no case at all, and Payner would never have been brought before the bar. This is simply not a case in which a federal court has attempted to exercise "general supervisory authority over operations of the Executive Branch," *ante*, at 737 (BURGER, C. J., concurring). Rather, this is a case where the District Court refused to be made an accomplice to illegal conduct by the IRS by permitting the agency to use the proceeds of its crimes for the very purpose for which they were committed—to convict persons such as Payner.

Contrary to the Court's characterization, this is also not a case in which there has been "indiscriminate" or "unbending" application of the exclusionary rule. The District Court noted that "exclusion on the basis of supervisory power is only done as a last resort," 434 F. Supp., at 134, n. 74. That court concluded that suppression was proper only where there had been "purposefully illegal" conduct by the Government to obtain the evidence or where the Government's conduct was "motivated by an intentional bad faith hostility to a constitutional right." *Id.*, at 134–135 (footnotes omitted). In this case, both those threshold requirements were met, and the District Court in addition concluded that absent suppression there was no deterrent to continued lawless conduct undertaken by the IRS to facilitate these types of prosecutions.[16] This is not "a 'chancellor's foot' veto [by the District

[16] There is no suggestion by the Government that any action has been taken against Casper, Jaffe, or others for the conduct exposed in this case. The Court admits that the corrective measures taken by the IRS "appear on their face to be less positive than one might expect from an agency charged with upholding the law," *ante*, at 733, n. 5. The District Court specifically found that the Government agents knew they were violating the Constitution at the time, 434 F. Supp., at 135, n. 79, and that continued manipulation of the standing limitations of the Fourth Amendment

Court] over law enforcement practices of which it did not approve," *United States* v. *Russell*, 411 U. S. 423, 435 (1973); *Hampton* v. *United States*, 425 U. S. 484, 490 (1976) (plurality opinion). As my Brother POWELL noted on a prior occasion: "The fact that there is sometimes no sharply defined standard against which to make these judgments [of fundamental fairness] is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances. . . . Nor do I despair of our ability in an appropriate case to identify appropriate standards for police practices without relying on the 'chancellor's' 'fastidious squeamishness or private sentimentalism.'" *Hampton* v. *United States*, *supra*, at 495, n. 6 (concurring in judgment). That appropriate case has arrived, and the Court should prevent the Government from profiting by use in the federal courts of evidence deliberately obtained by illegal actions taken in bad-faith hostility to constitutional rights.

I would affirm the judgment of the Court of Appeals and suppress the fruits of the Government's illegal action under the Court's supervisory powers.[17] Accordingly, I dissent.

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by the IRS could be deterred only by suppression of the evidence, *id.*, at 133.

[17] The Government argues that Rule 402 of the Federal Rules of Evidence stripped the federal judiciary of its supervisory powers to exclude evidence obtained through gross misconduct by agents of the United States. In the Court of Appeals this argument was relegated to one footnote, see Brief for United States in No. 78–5278 (CA6), p. 41, n. 27. The Court does not address the issue. I would merely note that the Government's discussion of the legislative history behind Rule 402 fails to convince me that it was Congress' intent to attempt such a radical curtailment of the long-established supervisory powers of the federal judiciary. See *United States* v. *Jacobs*, 547 F. 2d 772, 777 (CA2 1976), cert. dism'd as improvidently granted, 436 U. S. 31 (1978).

ROADWAY EXPRESS, INC. *v.* PIPER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79–701. Argued April 15, 1980—Decided June 23, 1980

Respondents were counsel for the plaintiffs in a civil rights class action in Federal District Court against petitioner alleging that its employment policies discriminated on the basis of race. Because respondents failed to comply with orders relating to discovery and the filing of briefs, petitioner moved to dismiss the suit and requested an award of attorney's fees and court costs under Federal Rule of Civil Procedure 37. The District Court dismissed the action with prejudice and ordered respondents to pay petitioner's costs and attorney's fees for the entire lawsuit. The court found justification for its ruling in the confluence of the civil rights statutes, 42 U. S. C. §§ 1988, 2000e–5 (k), which allow the prevailing party to recover attorney's fees "as part of the costs" of litigation, and 28 U. S. C. § 1927, which permits a court to tax the excess "costs" of a proceeding against a lawyer "who so multiplies the proceedings . . . as to increase costs unreasonably and vexatiously. . . ." However, the Court of Appeals vacated and remanded, holding that respondents were not liable for attorney's fees and rejecting the view that the civil rights statutes could be read into § 1927.

Held:

1. Title 28 U. S. C. § 1927 cannot be read to support the sanction of taxing attorney's fees against counsel who unreasonably extend court proceedings, by defining the term "costs" therein according to the civil rights statutes as including attorney's fees. Pp. 757–763.

(a) It may be assumed that when the first version of § 1927 was enacted in 1813, Congress followed the "American rule" that attorney's fees ordinarily are not among the "costs" that a winning party may recover. In an 1853 statute Congress substantially re-enacted the provisions now codified in § 1927 as part of a uniform, comprehensive measure setting the fees and costs for all federal actions. The history of the 1853 Act suggests that § 1927 should be read together with the provisions currently codified in 28 U. S. C. § 1920 which, without including attorney's fees, enumerate the costs that ordinarily may be taxed to a losing party. Moreover, petitioner offered no evidence that Congress intended to incorporate into § 1927 the attorney's fee provisions of 42 U. S. C. §§ 1988, 2000e–5 (k), which do not mention attorney liability for costs and fees. Pp. 759–761.

(b) The statutory interpretation proposed by petitioner could introduce into § 1927 distinctions unrelated to its goal of controlling abuses of judicial processes. The fee provisions of the civil rights laws are sensitive to the merits of the action and to antidiscrimination policy, restrict recovery to prevailing parties, and have been construed to treat plaintiffs and defendants somewhat differently. In contrast, § 1927 does not distinguish between winners and losers or between plaintiffs and defendants, and is indifferent to the equities of a dispute and to the values advanced by the substantive law. Moreover, petitioner's statutory construction would create an unjustifiable two-tier system of attorney sanctions whereby lawyers in cases brought under statutes permitting the award of attorney's fees would face stiffer penalties for prolonging litigation than would other attorneys. Pp. 761–763.

2. Rule 37 (b)'s sanctions for failure to comply with discovery orders, including holding parties and counsel personally liable for expenses, "including attorney's fees," must be applied diligently both to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent. *National Hockey League* v. *Metropolitan Hockey Club*, 427 U. S. 639. On remand, the District Court will have the authority to act upon petitioner's request for costs and attorney's fees under Rule 37 (b). Pp. 763–764.

3. In narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel. The general rule is that a litigant cannot recover his counsel fees, but that rule does not apply when the opposing party has acted in bad faith, including bad faith in the conduct of the litigation. In view of a court's power over members of its bar, if it may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. In this case, the trial court did not make a specific finding as to whether counsel's conduct constituted or was tantamount to bad faith, a finding that should precede any sanction under the court's inherent powers. Pp. 764–767.

599 F. 2d 1378, affirmed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and MARSHALL, JJ., joined; in Parts I, II, and IV of which STEWART and REHNQUIST, JJ., joined; in all but Part II–A and the first sentence of Part IV of which BLACKMUN, J., joined; and in Part II–B of which STEVENS, J., joined. BLACKMUN, J., *post*, p. 768, and STEVENS, J., *post*, p. 769, filed opinions concurring in part and dissenting in part. BURGER, C. J., filed a dissenting opinion, *post*, p. 771.

Miles Curtiss McKee argued the cause for petitioner. With him on the briefs was *Armin J. Moeller, Jr.*

Herschel E. Richard, Jr., argued the cause and filed a brief for respondents.

Harriet S. Shapiro argued the cause for the United States et al. as *amici curiae* urging affirmance. With her on the brief were *Solicitor General McCree, Assistant Attorney General Days, Leroy D. Clark, Joseph T. Eddins, Lutz Alexander Prager,* and *Raymond R. Baca.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether federal courts have statutory or inherent power to tax attorney's fees directly against counsel who have abused the processes of the courts.

I

In June 1975, two former employees and one unsuccessful job applicant brought a civil rights class action against petitioner Roadway Express, Inc. (Roadway). The complaint filed in the United States District Court for the Western District of Louisiana alleged that Roadway's employment policies discriminated on the basis of race, and asked for equitable relief.[1]

Counsel for the plaintiffs—Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile—are the respondents in the present case. In September 1975, respondents served interrogatories on Roadway. Having secured an extension from the District Court, Roadway answered the interrogatories on January 5, 1976, and served its own set of interrogatories at the same time. Thereafter, however, the litigation was stalled by respondents' uncooperative behavior.

**Jack Greenberg* and *James M. Nabrit III* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance.

[1] The initial complaint also named a local of the International Brotherhood of Teamsters as defendant.

On April 13, 1976, Roadway moved for an order compelling answers to its interrogatories. The motion was set for argument on the morning of April 21, but counsel for the plaintiffs did not appear. They did attend a rescheduled hearing that afternoon, and the Magistrate ordered that the interrogatories be answered by May 24. Respondents ignored that deadline and, in fact, never answered the interrogatories. Roadway also served notice in April that it would take depositions from all three plaintiffs in early May. One of the plaintiffs did not appear on the appointed days, however, and he never was deposed.

The respondents showed no greater respect for the orders of the District Court than for the requests of their adversaries. On April 7, the court instructed counsel for both sides to file briefs evaluating the impact of a recent decision in a related case. Although respondents' brief was due within 10 days, nothing arrived for six weeks. On May 19, the District Court gave respondents 10 additional days to file a brief or face dismissal of the action. No brief was ever submitted.

On June 14, Roadway moved to dismiss the suit under Federal Rule of Civil Procedure 37.[2] Roadway also requested an award of attorney's fees and court costs. On June 30, the District Court heard argument and dismissed the action with prejudice. A second hearing, limited to the question of costs and attorney's fees, was held in October 1976.

The District Court's opinion sharply criticized the respondents for their "deliberate inaction" in handling the case. *Monk* v. *Roadway Express, Inc.*, 73 F. R .D. 411, 417 (1977). Observing that respondents apparently had not advised their

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[2] If a party "fails to obey an order to provide or permit discovery," Rule 37 (b)(2)(C) allows the district court to "dismis[s] the action or proceeding or any part thereof, or rende[r] a judgment by default against the disobedient party." Rule 37 (b)(2)(E) also permits a court to "require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure. . . ."

clients that the suit was a class action, *id.*, at 414, 417, the court concluded that the three lawyers "improvidently enlarged and inadequately prosecuted" the action, *id.*, at 417. As a sanction, the court ordered them to pay Roadway's costs and attorney's fees for the entire lawsuit. The total assessment exceeded $17,000. *Monk* v. *Roadway Express, Inc.*, 599 F. 2d 1378, 1381 (CA5 1979).

The District Court found justification for its ruling in the confluence of several statutes. The civil rights statutes allow the prevailing party to recover attorney's fees "as part of the costs" of litigation. See 42 U. S. C. §§ 1988, 2000e–5 (k). And 28 U. S. C. § 1927 permits a court to tax the excess "costs" of a proceeding against a lawyer "who so multiplies the proceedings . . . as to increase costs unreasonably and vexatiously. . . ."[3] Read together, the District Court concluded, the statutes authorize the assessment of costs and attorney's fees against respondents.

The United States Court of Appeals for the Fifth Circuit found no clear error in the ruling that respondents had violated § 1927. 599 F. 2d, at 1381. The appellate court held, however, that respondents were not liable for attorney's fees. It rejected the District Court's view that the civil rights statutes can be read into § 1927. The civil rights laws, the court wrote, "provide for attorneys' fees awards against unsuccessful *parties* to a suit, and they focus on actions which are frivolous, unreasonable, and baseless. . . ." 599 F. 2d, at

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[3] Section 1927 states in full:

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

As the Court of Appeals pointed out, "§ 1927 provides only for *excess* costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation." *Monk* v. *Roadway Express, Inc.*, 599 F. 2d 1378, 1383 (CA5 1979) (emphasis in original).

1383 (emphasis in original). In contrast, § 1927 deals only with attorney conduct and involves taxing costs against counsel. The Court of Appeals vacated the District Court's order and remanded for recalculation of costs under § 1927. We granted certiorari, 444 U. S. 1012 (1980).

II

This case involves the problem of what sanctions may be imposed on lawyers who unreasonably extend court proceedings.[4] Two specific provisions have been said to be controlling in this case: 28 U. S. C. § 1927, and Federal Rule of Civil Procedure 37. This opinion considers both provisions.

A

Section 1927 provides that lawyers who multiply court proceedings vexatiously may be assessed the excess "costs" they create. The provision, however, does not define the critical word. Only if "costs" includes attorney's fees can § 1927 support the sanction in this case.

Courts generally have defined costs under § 1927 according to 28 U. S. C. § 1920, which enumerates the costs that ordinarily may be taxed to a losing party. *E. g., United States* v. *Ross,* 535 F. 2d 346, 350 (CA6 1976); *Kiefel* v. *Las Vegas Hacienda, Inc.,* 404 F. 2d 1163, 1170 (CA7 1968), cert. denied *sub nom. Hubbard* v. *Kiefel,* 395 U. S. 908 (1969).

[4] Due to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. Cf. C. Dickens, Bleak House 2–5 (1948). A number of factors legitimately may lengthen a lawsuit, and the parties themselves may cause some of the delays. Nevertheless, many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery. See Burger, Agenda for 2000 A. D.—A Need for Systematic Anticipation, 70 F. R. D. 83, 95–96 (1976); ABA, Report of Pound Conference Follow-Up Task Force, 74 F. R. D. 159, 191–192 (1976); U. S. Dept. of Justice, C. Ellington, A Study of Sanctions for Discovery Abuse 117 (1979). The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law.

Section 1920 lists clerk's and marshal's fees, court reporter charges, printing and witness fees, copying costs, interpreting costs, and the fees of court-appointed experts. Section 1920 also permits the assessment of the attorney "docket" fees set by 28 U. S. C. § 1923. In this case, that fee is $20. 28 U. S. C. § 1923 (a).

Roadway insists, however, that its recovery should not be restricted to the costs listed in § 1920. It argues that since courts look to § 1920 to determine the costs taxable under § 1927, they should be equally free to define costs according to other statutes that may be involved in a lawsuit. Roadway emphasizes that the civil rights statutes allow the award of attorney's fees "as part of the costs" of the litigation. 42 U. S. C. § 2000e–5 (k); 42 U. S. C. § 1988.[5] Accordingly, Roadway asks that we reinstate the District Court's award. This superficially appealing argument cannot survive careful consideration.

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[5] Section 2000e–5 (k) states: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

Section 1988 provides in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or in any civil action or proceedings [to enforce] a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

For the purposes of the issues in this opinion, the two provisions may be considered to have the same substantive content. See *Lopez* v. *Arkansas County Independent School Dist.*, 570 F. 2d 541, 545 (CA5 1978); *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F. 2d 34, 37–38 (CA2 1978). They authorize fee awards in identical language, and Congress acknowledged the close connection between the two statutes when it approved § 1988. S. Rep. No. 94–1011, pp. 2–6 (1976); H. R. Rep. No. 94–1558, pp. 5–8 (1976).

1

Congress enacted the first version of § 1927 in 1813. It was drafted by a Senate Committee appointed "to inquire what Legislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice. . . ." 26 Annals of Cong. 29 (1813). The resulting legislation provided in part that any person who "multiplied the proceedings in any cause . . . so as to increase costs unreasonably and vexatiously" could be held liable for "any excess of costs so incurred." Act of July 22, 1813, 3 Stat. 21. The sparse legislative history makes this provision difficult to interpret.[6]

In construing "costs," however, we may look to the contemporaneous understanding of the term. Cf. *Gilbert* v. *United States*, 370 U. S. 650, 655 (1962). In 1796 the Court decided *Arcambel* v. *Wiseman*, 3 Dall. 306. That ruling overturned an award of counsel fees on the ground that "[t]he general practice of the *United States* is in op[p]osition to it." *Ibid.* Thus, the Court recognized the "American rule" that attorney's fees ordinarily are not among the costs that a winning party may recover. See *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717–718 (1967). We may assume that Congress followed that rule when it approved the 1813 Act.

Congress returned to the problems of the federal courts in 1853, when it approved a comprehensive measure setting the fees and costs for all federal actions. Act of Feb. 26, 1853, 10 Stat. 162; see *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240, 251–253 (1975). Some of those provisions survive, largely intact, in 28 U. S. C. §§ 1920 and 1923. See

[6] A letter from the Secretary of the Treasury to the House of Representatives in 1842 suggests that the provision was prompted by the practices of certain United States Attorneys. H. R. Doc. No. 25, 27th Cong., 3d Sess., 21–22 (1842). Some of those officers, who were paid on a piecework basis, apparently had filed unnecessary lawsuits to inflate their compensation.

10 Stat. 161–162, 168. The 1853 statute also substantially re-enacted the earlier provision that allows lawyers who multiply legal proceedings to be taxed with the extra "costs" they generate. That provision, now codified as § 1927, has remained basically unchanged since 1853.[7]

This history suggests that § 1920 and § 1927 should be read together as part of the integrated statute approved in 1853. See *Erlenbaugh* v. *United States*, 409 U. S. 239, 243–244 (1972); 2A C. Sands, Sutherland on Statutory Construction § 51.03, p. 299 (4th ed. 1973). The 1853 Act specified the costs recoverable in federal litigation and also allowed the award of excess "costs" against counsel who vexatiously multiply litigation. The most reasonable construction is that the Act itself defined those costs that may be recovered from counsel. Congress, of course, may amend those provisions that derive from the 1853 Act.[8] In the absence of express modification of those provisions by Congress, however, we should not look beyond the Act for the definition of costs under § 1927.

The available legislative material supports this view. Congress in 1853 prescribed taxable costs for the same reasons it authorized the assessment of costs against dilatory attorneys: "[T]o prevent abuses arising from ingenious constructions . . . to discourage unnecessary prolixity, old useless forms, and the multiplication of proceedings, and the prosecutions of several suits which might better be joined in one."

[7] The attorney liability portion of the 1853 Act was codified as § 982 of the Revised Statutes, while the cost-setting portions were included as §§ 823 and 824. The portions assumed their present positions at §§ 1920, 1923, and 1927 of Title 28 in the Revised Code of 1948. See 28 U. S. C. §§ 1920, 1923, 1927 (1946 ed., Supp. II).

[8] For example, in 1978 Congress added 28 U. S. C. § 1920 (6) (1976 ed., Supp. II), providing for recovery of interpreting costs. Pub. L. 95–539, § 7, 92 Stat. 2044. Congress is now considering legislation that would expand § 1927 in all cases to include "costs, expenses and attorney's fees. . . ." H. R. 4047, 96th Cong., 1st Sess. (1979); S. 390, 96th Cong., 1st Sess., § 4 (1979).

H. R. Rep. No. 50, 32d Cong., 1st Sess., 6 (1852); see also *Alyeska Pipeline Co.* v. *Wilderness Society, supra,* at 251–253. Above all, Congress sought to standardize the treatment of costs in federal courts, to "make them uniform—make the law explicit and definite." H. R. Rep. No. 50, *supra,* at 6. The sponsor of the legislation spoke of the need for "uniform rule[s]," Cong. Globe, 32d Cong., 2d Sess., App. 207 (1853) (Sen. Bradbury), while other Senators agreed that the legislation was designed to impose "uniformity," *id.,* at 584 (Sen. Bayard); see also *id.,* at 589 (Sen. Geyer).

Roadway presses us to abandon the uniform approach of the 1853 Act. Because prevailing parties now may recover counsel fees in civil rights suits, Roadway argues that the statutes authorizing those recoveries should be read to modify § 1927. But Roadway offers no evidence that Congress intended to incorporate those attorney's fee provisions into § 1927. Neither § 1988 nor § 2000e–5 (k) makes any mention of attorney liability for costs and fees. Roadway identifies nothing in the legislative records of those provisions that suggests that Congress meant to control the conduct of litigation.[9] Without any evidence that Congress wished to alter the uniform structure established by the 1853 Act, we are reluctant to disrupt it. See *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* at 719–720.

2

The statutory interpretation proposed by Roadway not only runs counter to the apparent intent of Congress in 1813 and 1853, but also could introduce into the statute distinctions unrelated to its goal. Indeed, Roadway's argument could result in virtually random application of § 1927 on the basis of other

[9] The Senate Report accompanying § 1988 stated that the bill authorizes "an award of attorneys' fees against a *party*. . . ." S. Rep. No. 94–1011, p. 5 (1976) (emphasis supplied). This reference reinforces the view that the statute was not intended to permit recovery from opposing counsel.

laws that do not address the problem of controlling abuses of judicial processes.

The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrimination policy. Unlike § 1927, both § 1988 and § 2000e–5 (k) restrict recovery to prevailing parties. In addition, those provisions have been construed to treat plaintiffs and defendants somewhat differently. Prevailing plaintiffs in civil rights cases win fee awards unless "special circumstances would render such an award unjust," *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 402 (1968) (*per curiam*), but a prevailing defendant may be awarded counsel fees only when the plaintiff's underlying claim is "frivolous, unreasonable, or groundless." *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 422 (1978). This distinction advances the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation.

But § 1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes. Dilatory practices of civil rights plaintiffs are as objectionable as those of defendants. In order to assess counsel fees against respondents under § 1927, the Court would have to adopt one of two alternatives. It could incorporate into § 1927 the normative considerations of the civil rights laws that are foreign to the 1813 enactment. Or the Court could select on an ad hoc basis those features of § 1988 and § 2000e–5 (k) that should be read into § 1927. The first course would alter fundamentally the nature of § 1927; the second would constitute standardless judicial lawmaking.

Moreover, Roadway's statutory construction would create a two-tier system of attorney sanctions. A number of federal statutes permit the award of attorney's fees. See *Alyeska*

Pipeline Co. v. *Wilderness Society*, 421 U. S., at 260, n. 33. Under Roadway's view of § 1927, lawyers in cases brought under those statutes would face stiffer penalties for prolonging litigation than would other attorneys. There is no persuasive justification for subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct. A court's processes may be as abused in a commercial case as in a civil rights action. Without an express indication of congressional intent, we must hesitate to reach the imaginative outcome urged by Roadway, particularly when a more plausible construction flows from the original enactments in 1813 and 1853. To avoid the arbitrary results of Roadway's argument, *Commissioner* v. *Brown*, 380 U. S. 563, 571 (1965), citing *Helvering* v. *Hammel*, 311 U. S. 504, 510–511 (1941), we must reject the claim that § 1988 and § 2000e–5 (k) may supplant the framework established by the 1853 Act.

B

Federal Rule of Civil Procedure 37 (b) authorizes sanctions for failure to comply with discovery orders. The District Court may bar the disobedient party from introducing certain evidence, or it may direct that certain facts shall be "taken to be established for the purposes of the action. . . ." The Rule also permits the trial court to strike claims from the pleadings, and even to "dismiss the action . . . or render a judgment by default against the disobedient party." See *National Hockey League* v. *Metropolitan Hockey Club*, 427 U. S. 639 (1976) (*per curiam*); *Dellums* v. *Powell*, 184 U. S. App. D. C. 339, 566 F. 2d 231 (1977). Both parties and counsel may be held personally liable for expenses, "including attorney's fees," caused by the failure to comply with discovery orders.[10] Rule 37 sanctions must be applied diligently

[10] See *Stanziale* v. *First National City Bank*, 74 F. R. D. 557 (SDNY 1977) (attorneys); *Charron* v. *Meaux*, 66 F. R. D. 64 (SDNY 1975) (party); *Chesa International, Ltd.* v. *Fashion Associates, Inc.*, 425 F.

both "to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League* v. *Metropolitan Hockey Club, supra,* at 643.

The respondents in this case never have complied with the District Court's order that they answer Roadway's interrogatories. That failure was the immediate ground for dismissing the case, 73 F. R. D., at 412, and it also exposed respondents and their clients to liability under Rule 37 (b) for the resulting costs and attorney's fees. Indeed, Roadway's motion for dismissal sought recovery of those expenses under Rule 37. On the remand of this action, the District Court will have the authority to act upon that request.

III

Roadway also contends that the District Court's ruling was a proper exercise of the court's inherent powers.[11] The inherent powers of federal courts are those which "are necessary to the exercise of all others." *United States* v. *Hudson,* 7 Cranch 32, 34 (1812). The most prominent of these is the contempt sanction, "which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court. . . ." *Cooke* v. *United States,* 267 U. S. 517, 539 (1925); see 4 W. Blackstone, Commentaries *282–*285. Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion. See *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418,

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Supp. 234 (SDNY), aff'd, 573 F. 2d 1288 (CA2 1977) (joint liability of attorney and party).

[11] MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST would not reach the inherent power question considered in Part III of the opinion. Rather, they view that question as a substantial issue that should be addressed by the District Court on remand.

450–451 (1911); *Green* v. *United States*, 356 U. S. 165, 193–194 (1958) (Black, J., dissenting). There are ample grounds for recognizing, however, that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel.

In *Link* v. *Wabash R. Co.*, 370 U. S. 626, 632 (1962), this Court recognized the "well-acknowledged" inherent power of a court to levy sanctions in response to abusive litigation practices. The trial court had dismissed an action for failure to prosecute. Mr. Justice Harlan wrote for the Court:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of *nonsuit* and *non prosequitur* entered at common law, *e. g.*, 3 Blackstone, Commentaries (1768), 295–296, and dismissals for want of prosecution of bills in equity, *e. g.*, *id.*, at 451." *Id.*, at 629–630 (footnote omitted).

The Court denied that Federal Rule of Civil Procedure 41 (b) limits a court's power to dismiss for failure to prosecute to instances where a defendant moves for dismissal. The Court wrote: "The authority . . . to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs. . . ." 370 U. S., at 630. Since the assessment of counsel fees is a less severe sanction than outright dismissal, *Link* strongly supports Roadway's contention here.

Of course, the general rule in federal courts is that a litigant cannot recover his counsel fees. See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S., at 257. But that rule does

not apply when the opposing party has acted in bad faith. In *Alyeska*, we acknowledged the "inherent power" of courts to

> "assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant[,] *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 426–428 (1923),' *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra*, at 718; or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .' *F. D. Rich Co.* [v. *United States ex rel. Industrial Lumber Co.*], 417 U. S. [116], at 129 [(1974)] (citing *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962))." *Id.*, at 258–259.

The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. "'[B]ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall* v. *Cole*, 412 U. S. 1, 15 (1973). See *Browning Debenture Holders' Comm.* v. *DASA Corp.*, 560 F. 2d 1078, 1088 (CA2 1977). This view coincides with the ruling in *Link, supra*, which approved judicial power to dismiss a case not because the substantive claim was without merit, but because the plaintiff failed to pursue the litigation.

The power of a court over members of its bar is at least as great as its authority over litigants.[12] If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. See Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Calif. L. Rev. 264, 268

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[12] See generally *In re Bithoney*, 486 F. 2d 319 (CA1 1973); *Flaksa* v. *Little River Marine Constr. Co.*, 389 F. 2d 885, 888–889 (CA5), cert. denied, 392 U. S. 928 (1968); *Gamble* v. *Pope & Talbot, Inc.*, 307 F. 2d 729, 735–736 (CA3) (en banc) (Biggs, C. J., dissenting), cert. denied *sub nom. United States District Court* v. *Mahoney*, 371 U. S. 888 (1962).

(1979).[13] Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.[14] But in a proper case, such sanctions are within a court's powers.

IV

We affirm the ruling of the Court of Appeals on § 1927. Since the District Court did not consider the costs and fees that Roadway might recover under Rule 37, that question must be addressed on remand. Similarly, the trial court did not make a specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers. The case is remanded to the Court of

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[13] New York courts have ordered attorneys who delay litigation to pay costs or fines to the opposing party. *E. g., Moran* v. *Rynar*, 39 App. Div. 2d 718, 332 N. Y. S. 2d 138 (1972); *Kahn* v. *Stamp*, 52 App. Div. 2d 748, 382 N. Y. S. 2d 199 (1976); *Gillet* v. *Beth Israel Medical Center*, 99 Misc. 2d 172, 415 N. Y. S. 2d 738 (Sup. Ct. 1979). The state-court opinions cite no statutory authority for their holdings, apparently relying on the inherent powers of those courts. *Moran* v. *Rynar*, *supra*, noted favorable commentary on *Schwarz* v. *United States*, 384 F. 2d 833, 836 (CA2 1967), which suggested that courts faced with cases "of inexcusable neglect by counsel [should consider] imposing substantial costs and attorney's fees payable by offending counsel personally to the opposing party. . . ." Although the New York courts have sanctioned lawyers for mere negligence, this opinion addresses only bad-faith conduct.

[14] Some due process implications of sanctions for misconduct of litigation were discussed in *Societe Internationale* v. *Rogers*, 357 U. S. 197, 208–212 (1958), which reversed the dismissal of an action for failure to comply with a pretrial discovery order. The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers. Cf. *Schwarz* v. *United States*, *supra*. Moreover, *Societe Internationale* did not involve willful misconduct or bad faith. The Court found that the party whose claim was dismissed had been barred by a Swiss criminal statute from complying with the order. 357 U. S., at 209, 211.

Appeals with directions to return it to the District Court for proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I join the Court's opinion except Part II–A thereof and except the first sentence of Part IV thereof.

Essentially for the reasons stated in the first three paragraphs of the respective opinions of THE CHIEF JUSTICE and of MR. JUSTICE STEVENS, I do not join Part II–A. I add to those reasons my concern that the Court's analysis means that 28 U. S. C. § 1927 does not permit imposition on opposing counsel of "excess" attorney's fees generated by his vexatiousness and otherwise shifted to his client under 42 U. S. C. § 2000e–5 (k), 42 U. S. C. § 1988, or any other specialized attorney's fees provisions. See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240, 260, n. 33 (1975) (collecting statutes). This construction of the statute penalizes the innocent client, while insulating his wrongdoing attorney. That result, in my view, clashes with common sense, basic fairness, and the plain meaning of the statute. See *Owen* v. *City of Independence*, 445 U. S. 622, 654 (1980) ("Elemental notions of fairness dictate that one who causes a loss should bear the loss"). See also 122 Cong. Rec. 31832 (1976) (regarding proposed § 1988: "Mr. ABOUREZK. So if somebody thought, some lawyer thought, he was going to make a lot of money by bringing civil rights suits *he would be subject to being penalized himself;* is that not correct? Mr. HATHAWAY. The Senator is correct") (emphasis added).[1]

[1] One point regarding the Court's analysis of § 1927 seems to me to merit special mention. In rejecting the District Court's reading of that statute, the Court concludes that "a prevailing defendant may be awarded counsel fees *only* when the plaintiff's underlying claim is 'frivolous, unreasonable, or groundless.'" *Ante*, at 762 (emphasis added), citing *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 422 (1978). This state-

Significantly different considerations of policy and fairness bear on the inherent-power issue addressed in Part III of the Court's opinion. I believe, however, that the opinion marshals persuasive reasons for recognizing a component of the bad-faith exception of the American Rule authorizing recovery of attorney's fees directly from a vexatious opposing counsel.[2]

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

By its terms, 28 U. S. C. § 1927 applies to "cases in any court of the United States" and allows the recovery of excess costs from "[a]ny attorney" who vexatiously multiplies the proceedings "in any case."[1] This language is broad enough to encompass a civil rights class action alleging racial discrim-

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ment has two troubling implications. First, it would seem to pretermit the § 1927 issue, which the Court goes on to consider at length. Clearly, the District Court based its attorney's fee award on counsel's conduct during the suit, rather than on the absence of a meritorious claim. If only the latter can support fee-shifting under § 1988 or § 2000e–5 (k), attorney's fees were not "reasonable" in the first place, the predicate for applying § 1927 was lacking, and this case presents no occasion to construe that provision. Second, the Court's reading of *Christiansburg Garment* is a questionable one that may produce undesirable results in future cases. *Christiansburg Garment* simply did not present the issue whether "frivolous, unreasonable, or groundless" *conduct* by a plaintiff in the course of prosecuting a colorable claim might justify fee-shifting in favor of the defendant under § 1988 or § 2000e–5 (k). In my view, there are strong arguments that attorney's fees generated by such conduct would be "reasonable" within the meaning of those statutes. I am troubled that the Court reaches the opposite conclusion without explaining why.

[2] The Court does not explore the specific features of this exception. Most significantly, it does not address the permissibility of applying this new exception to award attorney's fees beyond those actually attributable to the culpable attorney's vexatious actions (*i. e.*, "excess costs" under § 1927). Like the Court, I am willing to let this issue be considered in the first instance on the remand.

[1] See *ante*, at 756, n. 3.

ination in employment. Two separate statutes specifically authorize the recovery of attorney's fees "as part of the costs" in this kind of litigation.[2] Of course, such fees, like any other cost items, are normally recoverable only from the losing litigant rather than from the attorney personally. But it seems to me that § 1927 gives the court the power to assess against counsel any item of cost that could be assessed against a party when that attorney unreasonably and vexatiously multiplies the proceedings.

The Court seems concerned about the fact that the standards for allowing a *party* to recover fees differ for plaintiffs and defendants in civil rights litigation. *Ante*, at 762. I simply do not understand the relevance of that concern. As I read § 1927, the sanction may be applied to an obstreperous lawyer regardless of whether his client prevails, so long as fees may be awarded as part of the costs in the litigation.

The Court also states that there "is no persuasive justification" for subjecting lawyers in different areas of practice to the risk of differing sanctions. *Ante*, at 763. But Congress has made a legislative decision to treat lawyers in civil rights litigation differently than they are treated in most types of litigation. Because of that congressional determination, lawyers in these cases are more likely to be well paid than other lawyers and, conversely, their misconduct may subject their clients to liability for the fees of opposing counsel. A conclusion that such special treatment also subjects these lawyers to an additional risk for failing to observe the normal proprieties that obtain in litigation does not strike me as anomalous.

Ironically, the Court rejects my rather straightforward approach to the statutory language because it "would constitute standardless judicial lawmaking," *ante*, at 762, but then, in Part III of its opinion, embarks on a venture of its own that

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[2] Title 42 U. S. C. § 1988 and § 2000e–5 (k) both authorize an award of attorney's fees to the prevailing party "as part of the costs" of the litigation.

surely fits that description neatly. Although a trial court has inherent contempt powers, I have the gravest doubts about its inherent power to order a lawyer to pay damages to an opposing litigant. Since it is not at all necessary to reach out to decide that issue, however, I would simply answer the statutory question presented by the certiorari petition.

Although I do not disagree with the Court's discussion of Rule 37 in Part II–B of its opinion, I respectfully dissent from its construction of § 1927 and its inherent-power holding.

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent from the Court's holding that it was improper for the District Court to look to 42 U. S. C. §§ 1988 and 2000e–5 (k) to determine whether attorney's fees were assessable as part of the excess costs which the respondent attorneys could be made to pay under 28 U. S. C. § 1927.

Section 1927 does not itself attempt to define the costs which an attorney may be forced to pay because of vexatious, dilatory tactics and conduct, except to state that the attorney may be forced to pay only the *excess* costs generated by his misconduct. One must look elsewhere to determine the types of costs which are assessable. It may be correct that ordinarily a court would look to 28 U. S. C. § 1920, which does not include attorney's fees among its enumerated items. But whether or not attorney's fees are recoverable as costs depends on the type of action involved. In *Hutto* v. *Finney*, 437 U. S. 678, 697 (1978), the Court noted that "there are a large number of statutory and common-law situations in which allowable costs include counsel fees." In a footnote, the Court observed: "In 1975, we listed 29 statutes allowing federal courts to award attorney's fees in certain suits. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S., at 260–261, n. 33. Some of these statutes define attorney's fees as an element of costs, while others separate fees from other taxable costs. Compare 42 U. S. C. § 2000a–3 (b) with 29 U. S. C. § 216 (b) (1970 ed., Supp. V)." *Id.*, at 697, n. 28.

Title 42 U. S. C. § 2000a–3 (b), in pertinent part, states that the court in its discretion "may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ," whereas 29 U. S. C. § 216 (b) states that the court shall "allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." Comparing the language of these sections to that of 42 U. S. C. §§ 1988 and 2000e–5 (k) at issue here, it seems plain to me that §§ 1988 and 2000e–5 (k) fall within the first category—statutes which define attorney's fees as an element of costs. The Court said this in so many words in *Hutto* with regard to § 1988. 437 U. S., at 695.

Thus, by statute, in Title VII actions, or in actions to enforce 42 U. S. C. §§ 1981, 1983, 1985, and 1986, attorney's fees are an element of costs. Sections 1988 and 2000e–5 (k) state that the awards may be made to the prevailing party, as was the instant award. They do not state who is to bear the costs. Normally, of course, the losing party will bear the costs. But if the court finds that the costs have been increased "unreasonably and vexatiously," § 1927 empowers the court to make the errant attorneys themselves bear the excess costs occasioned by their misconduct. That is what happened here.

Respondents correctly point out that this Court has held in *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), that if the award is against the plaintiff, the suit must be found to have been frivolous, unreasonable, or without foundation. But that case does not determine the standard for an award of excess costs against an attorney. Section 1927 itself provides that standard; the attorney must have so multiplied the proceedings as to have increased costs unreasonably and vexatiously. Here, both the District Court and the Court of Appeals agreed that that standard had been met.

Given this disposition, I would not reach the other issues decided by the Court today.

Syllabus

O'BANNON, SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA *v.* TOWN COURT NURSING CENTER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78–1318. Argued November 6, 1979—Decided June 23, 1980

After the Department of Health, Education, and Welfare (HEW) and the Pennsylvania Department of Public Welfare (DPW) had revoked the authority of Town Court Nursing Center (a nursing home) to provide elderly residents of the home with nursing care at government expense under Medicare and Medicaid provider agreements, the home and several of its patients (respondents) brought suit in Federal District Court, alleging, *inter alia*, that the patients were entitled to an evidentiary hearing on the merits of the revocation before the Medicaid payments were discontinued. The District Court ultimately rejected this argument. On appeal, the Court of Appeals reversed, holding that the patients had a constitutionally protected property interest in continued residence at the nursing home that gave them a right to a pretermination hearing on whether the home's Medicare and Medicaid provider agreements should be renewed. In so holding, the court relied on three Medicaid provisions: 42 U. S. C. § 1396a (a)(23) (1976 ed., Supp. II), which gives Medicaid recipients the right to obtain services from any qualified facility, a federal regulation prohibiting certified facilities from transferring or discharging a patient except for specified reasons, and a federal regulation prohibiting the reduction or termination of financial assistance without a hearing.

Held: The patients have no interest in receiving benefits for care in a particular facility that entitles them, as a matter of constitutional law, to a hearing before HEW and DPW can decertify that facility. Whatever legal rights the patients may have against the nursing home for failing to maintain its status as a qualified nursing home, the enforcement by HEW and DPW of their valid regulations did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property. Pp. 784–790.

(a) Whether viewed singly or in combination, the Medicaid provisions relied upon by the Court of Appeals do not confer a right to continued residence in the nursing home of one's choice. While 42 U. S. C. § 1396a (a)(23) (1976 ed., Supp. II) by implication gives recipients the right to be free from government interference with the choice to remain in a

home that continues to be qualified, it does not confer a right to continue to receive benefits for care in a home that has been decertified. Although the regulations in question protect patients by limiting the circumstances under which a home may transfer or discharge a Medicaid recipient, they do not purport to limit the Government's right to make a transfer necessary by decertifying a facility. And, since decertification does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in financial benefits are irrelevant. Pp. 785–786.

(b) This case does not involve the withdrawal of direct benefits. Rather, it involves the Government's attempt to confer an indirect benefit on Medicaid patients by imposing and enforcing minimum standards of care on facilities like Town Court. When enforcement of those standards requires decertification of a facility, there may be an immediate, adverse impact on some residents. But that impact, which is an indirect and incidental result of the Government's enforcement action, does not amount to a deprivation of any interest in life, liberty, or property. Pp. 786–789.

586 F. 2d 280, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 790. BRENNAN, J., filed a dissenting opinion, *post*, p. 805. MARSHALL, J., took no part in the consideration or decision of the case.

Norman J. Watkins, Special Deputy Attorney General of Pennsylvania, argued the cause for petitioner. With him on the briefs was *Edward G. Biester, Jr.* *Richard A. Allen* argued the cause for the Secretary of Health, Education, and Welfare, respondent under this Court's Rule 21 (4), in support of petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock, Deputy Solicitor General Easterbrook,* and *William Kanter.*

Nathan L. Posner argued the cause for respondents. With him on the brief were *William F. Coyle, Jeffrey B. Albert,* and *Abraham C. Reich.**

*Briefs of *amici curiae* urging affirmance were filed by *Michael H. Mar-*

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether approximately 180 elderly residents of a nursing home operated by Town Court Nursing Center, Inc., have a constitutional right to a hearing before a state or federal agency may revoke the home's authority to provide them with nursing care at government expense. Although we recognize that such a revocation may be harmful to some patients, we hold that they have no constitutional right to participate in the revocation proceedings.

Town Court Nursing Center, Inc. (Town Court), operates a 198-bed nursing home in Philadelphia, Pa. In April 1976 it was certified by the Department of Health, Education, and Welfare (HEW) as a "skilled nursing facility," thereby becoming eligible to receive payments from HEW and from the Pennsylvania Department of Public Welfare (DPW), for providing nursing care services to aged, disabled, and poor persons in need of medical care. After receiving its certification,[1] Town Court entered into formal "provider agreements" with both HEW and DPW. In those agreements HEW and DPW agreed to reimburse Town Court for a period of one year for care provided to persons eligible for Medicare or Medicaid benefits under the Social Security Act,[2] on the condition that Town Court continue to qualify as a skilled nursing facility.

On May 17, 1977, HEW notified Town Court that it

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cus, Gary Roberts, John L. Carroll, and *Morris Dees* for Jill Harris et al.; by *Kalman Finkel, John E. Kirklin,* and *Philip M. Gassel* for the Legal Aid Society of New York City et al.; and by *Toby S. Edelman* and *Edward C. King* for the National Citizens' Coalition for Nursing Home Reform.

[1] The certification in 1976 was Town Court's second; it had first been certified in 1967. It was decertified in 1974 as a result of substantial noncompliance with both state and federal requirements.

[2] The Medicare Program, see 42 U. S. C. § 1395 *et seq.*, which is primarily for the benefit of the aged and the disabled, is financed and administered entirely by the Federal Government (HEW); the Medicaid Program, see 42 U. S. C. § 1396 *et seq.*, which is primarily designed for the poor, is a cooperative federal-state program.

no longer met the statutory and regulatory standards for skilled nursing facilities and that, consequently, its Medicare provider agreement would not be renewed.[3] The HEW notice stated that no payments would be made for services rendered after July 17, 1977, explained how Town Court might request reconsideration of the decertification decision, and directed it to notify Medicare beneficiaries that payments were being discontinued. Three days later DPW notified Town Court that its Medicaid provider agreement would also not be renewed.[4]

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[3] HEW based its determination on a survey conducted by DPW, which recommended that the home be decertified. In its notice to Town Court HEW stated in part:

"In order to participate in the Medicare Program, a skilled nursing facility must meet the statutory requirements contained in section 1861 (j) of the Act, 42 USC 1395 x (j), as well as all other health and safety requirements established by the Secretary in subpart J, part 405, title 20 of the Code of Federal Regulations. A participating skilled nursing facility is required to be in compliance with all of the eighteen conditions of participation for such facilities contained in subpart J.

"On May 8–11, 1977, the Pennsylvania Department of Health performed a survey of your facility. That survey found that your facility does not comply with seven of the eighteen conditions of participation. The seven conditions not being complied with are:

"II.	Governing Body and Management	(405.1121)
"III.	Medical Direction	(405.1122)
"IV.	Physical Services	(405.1123)
"V.	Nursing Services	(405.1124)
"VIII.	Pharmaceutical Services	(405.1127)
"XIII.	Medical Records	(405.1132)
"XV.	Physical Environment	(405.1134)

"Your facility's failure to comply with these conditions of participation precludes renewal of your agreement. Renewal is also precluded by the fact that your facility has failed to maintain compliance with numerous standards which had previously been determined to be met. Please refer to 20 CFR 405.1908 (d)." App. 295a–296a.

[4] The state agency's letter read in part:

"Because the Medicare Program has terminated your participation, the Department of Public Welfare has no alternative but to likewise ter-

Town Court requested HEW to reconsider its termination decision. While the request was pending, Town Court and six of its Medicaid patients [5] filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging that both the nursing home and the patients were entitled to an evidentiary hearing on the merits of the decertification decision before the Medicaid payments were discontinued. The complaint alleged that termination of the payments would require Town Court to close and would cause the individual plaintiffs to suffer both a loss of benefits and "immediate and irreparable psychological and physical harm." App. 11a.

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minate your participation under the Medical Assistance Program. The Federal regulations, 45 C. F. R. § 249.33 (a) (9), require that a State medical assistance plan must:

" 'Provide that in the case of skilled nursing facilities certified under the provisions of title XVIII of the Social Security Act, the term of a provider agreement shall be subject to the same terms and conditions and coterminous with the period of approval of eligibility specified by the Secretary pursuant to that title, *and upon notification that an agreement with a facility under title XVIII of the Act has been terminated or cancelled, the single State agency will take appropriate action to terminate the facility's participation under the plan.* A facility whose agreement has been cancelled or otherwise terminated may not be issued another agreement until the reasons which cause the cancellation or termination have been removed and reasonable assurance provided the survey agency that they will not recur.' (emphasis supplied)

"Because of the requirements of HEW, your facility must be terminated from participation in the Medical Assistance Program effective June 18, 1977." *Id.*, at 291a–292a.

[5] At the time the suit was filed, no Town Court residents were Medicare recipients. However, Town Court did have a Medicare provider agreement with HEW, the nonrenewal of which automatically triggered the nonrenewal of its Medicaid agreement. See n. 4, *supra*.

Although the plaintiffs filed their action on behalf of a class of all Medicaid recipients in the home, the District Court never certified the class. Thus, the action has proceeded throughout the Court of Appeals and in this Court as an individual action on behalf of the six named plaintiffs.

The District Court granted a preliminary injunction against DPW and HEW, requiring payments to be continued for new patients as well as for patients already in the home and prohibiting any patient transfers until HEW acted on Town Court's petition for reconsideration. After HEW denied that petition, the District Court dissolved the injunction and denied the plaintiffs any further relief, except that it required HEW and DPW to pay for services actually provided to patients.

Town Court and the six patients filed separate appeals from the denial of the preliminary injunction, as well as a motion, which was subsequently granted, for reinstatement of the injunction pending appeal. The Secretary of HEW cross-appealed from the portion of the District Court's order requiring payment for services rendered after the effective date of the termination. The Secretary of DPW took no appeal and, though named as an appellee, took no position on the merits.

The United States Court of Appeals for the Third Circuit, sitting en banc, unanimously held that there was no constitutional defect in the HEW procedures that denied Town Court an evidentiary hearing until after the termination had become effective and the agency had ceased paying benefits.[6] The

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[6] Relying on this Court's decision in *Mathews* v. *Eldridge*, 424 U. S. 319, the Court of Appeals held that Town Court's property interests were sufficiently protected by informal pretermination procedures and by the opportunity for an administrative hearing and federal-court review after benefits had been terminated:

"As was true in *Eldridge*, the decision not to renew a provider agreement is an easily documented, sharply focused decision in which issues of credibility and veracity play little role. It is based in most cases upon routine, standard, unbiased reports by health care professionals. Those professionals evaluate the provider in light of well-defined criteria that were developed in the administrative rule-making process. Written submissions are adequate to allow the provider to present his case. Given the extensive documentation that the provider is able to submit in response to the findings of the survey teams, the provider is unlikely to need an eviden-

Court of Appeals came to a different conclusion, however, with respect to the patients' claim to a constitutional right to a pretermination hearing. *Town Court Nursing Center, Inc.* v. *Beal*, 586 F. 2d 280 (1978).[7]

Relying on the reasoning of *Klein* v. *Califano*, 586 F. 2d 250 (CA3 1978) (en banc), decided the same day, a majority of the court concluded that the patients had a constitutionally protected property interest in continued residence at Town Court that gave them a right to a pretermination hearing. In *Klein* the court identified three Medicaid provisions—a statute giving Medicaid recipients the right to obtain services from any qualified facility,[8] a regulation prohibiting certified

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tiary hearing in order to present his position more effectively. In any event, there is ample opportunity to expand orally upon written submissions during the exit interview or in discussions during the survey itself. There is opportunity to submit additional evidence after notice of deficiencies is given, and the evidence upon which the recommendation of the survey team is based is disclosed fully to the provider. Moreover, the criteria used to evaluate the provider are well known in advance to the provider, and compliance is readily proved or disproved by written submission. Finally, review by an administrative law judge, by the Appeals Council of HEW, and ultimately by the federal courts, insures that the decision of the Secretary will be thoroughly examined before becoming final.

"As stated in *Eldridge*, the public interest in preserving scarce financial and administrative resources is strong. Given the large number of providers participating in Medicare and the frequent surveys that are required, we believe that the costs of providing pre-termination hearings would be substantial. Further, the public has a strong interest in insuring that elderly and infirm nursing home patients are not required to stay in non-complying homes longer than is necessary to assure that the provider had adequate notice and opportunity to respond to charges of deficiencies." *Town Court Nursing Center, Inc.* v. *Beal*, 586 F. 2d 266, 277–278 (1978). Town Court did not seek further review of this determination.

[7] At the time the litigation began Frank S. Beal was the Pennsylvania Secretary of Public Welfare. He has since been replaced in that position by Helen B. O'Bannon, the petitioner in this Court.

[8] Title 42 U. S. C. § 1396a (a)(23) (1976 ed., Supp. II) provides, in relevant part:

"[A]ny individual eligible for medical assistance (including drugs) may

facilities from transferring or discharging a patient except for certain specified reasons,[9] and a regulation prohibiting the reduction or termination of financial assistance without a hearing[10]—which, in its view, created a "legitimate entitlement to continued residency at the home of one's choice absent specific cause for transfer." *Id.*, at 258. It then cited the general due process maxim that, whenever a governmental benefit may be withdrawn only for cause, the recipient is entitled to a hearing as to the existence of such cause. See *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, 11. Finally, it held that, since the inevitable consequence of decertifying a facility is the transfer of all its residents receiving Medicaid benefits, a decision to decertify should be treated as a decision to transfer, thus triggering the patients' right to a hearing on the issue of whether there is adequate cause for the transfer.[11]

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obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services. . . ."

The same "free choice of providers" is also guaranteed by 42 CFR § 431.51 (1979).

[9] Title 42 CFR § 405.1121 (k)(4) (1979) requires skilled nursing facilities that are licensed either as Medicaid or Medicare providers to establish written policies and procedures to ensure that each patient admitted to the facility "[i]s transferred or discharged only for medical reasons, or for his welfare or that of other patients, or for nonpayment of his stay (except as prohibited by titles XVIII or XIX of the Social Security Act), and is given reasonable advance notice to ensure orderly transfer or discharge. . . ."

[10] Title 45 CFR § 205.10 (a)(5) (1979) provides, in relevant part, that an "opportunity for a hearing shall be granted to any applicant who requests a hearing because his or her claim for financial assistance . . . or medical assistance is denied, . . . and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance."

[11] "Because a decision to decertify a nursing home as an unqualified

Applying this reasoning in *Town Court*, six judges held that the patients were entitled to a pretermination hearing on the issue of whether Town Court's Medicare and Medicaid provider agreements should be renewed.[12] The court thus reinstated that portion of the preliminary injunction that prohibited patient transfers until after the patients had been granted a hearing and affirmed that portion that required HEW and DPW to continue paying benefits on behalf of Town Court residents. It then remanded, leaving the nature of the hearing to be accorded the patients to be determined, in the first instance, by the District Court. Three judges dissented, concluding that neither the statutes nor the regulations granted

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provider is tantamount to an order to transfer a patient for his welfare, Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare." 586 F. 2d, at 258.

[12] Three judges joined a brief opinion announcing the judgment of the court authored by Judge Aldisert, which disposed of the case in a summary fashion based on the reasoning of *Klein* v. *Califano*. Judge Adams wrote a concurring opinion, which was also joined by three judges (two of whom also joined Judge Aldisert), in which he attempted to explain more fully the reasoning in *Klein*. Referring to the three provisions relied upon in *Klein*, Judge Adams stated that they

". . . paint three distinct points in the landscape of a 'legitimate claim of entitlement' that Medicaid beneficiaries can assert. Taken alone, the interest created by each of these clauses might be dismissed as not rising to the level of a cognizable property interest. However, when viewed together, they compel the conclusion that they identify three aspects of an 'underlying substantive interest' that enjoys the stature of 'property.'" (Footnote omitted.) 586 F. 2d, at 287.

Judge Adams also relied, to some extent, on the hardship that nursing home residents might suffer if forced to transfer to another home, stating that the "health" and "home" interests the residents possess in remaining in a particular nursing home are "among those that most persons would regard as being encompassed by the protections of the due process clause." *Id.*, at 289. Finally, unlike Judge Aldisert, Judge Adams went on to suggest what types of procedures would be necessary before Medicaid patients could be transferred.

the patients any substantive interest in decertification proceedings and that they had no constitutionally protected property right in uninterrupted occupancy.[13]

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[13] Chief Judge Seitz summarized his response to the three parts of the majority's analysis as follows:

"The majority finds that continued residency in the nursing home of one's choice absent specific cause for transfer is an underlying substantive interest created by three Medicaid provisions. Under the first, 42 U. S. C. § 1396a (a)(23), a Medicaid recipient may obtain medical care 'from any institution . . . qualified to perform the service or services required.' Clearly, what the majority characterizes as a recipient's right to obtain medical care from a 'freely selected provider' is limited to a choice among institutions which have been determined by the Secretary to be 'qualified.' Next, the majority's reliance on 45 C. F. R. § 205.10 (a)(5), ensuring a notice and hearing to a recipient whose benefits are suspended, reduced, discontinued or terminated, is obviously misplaced. As the majority itself notes, the decertification of these facilities did not reduce or suspend the residents' rights to continued benefits.

"Finally, the majority relies upon 45 C. F. R. § 249.12 (a)(1)(ii)(B)(4), which establishes as one requirement for an institution's certification that each resident admitted to that institution be 'transferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay.' The majority reads this provision as a limitation on the Secretary's power to interrupt a recipient's residence at a particular institution. Clearly, however, this provision is a standard of conduct imposed by the Secretary upon the provider. Violation of this standard is one of many grounds for decertifying the offending institution. See 45 C. F. R. §§ 249.33 (a)(2), 249.10 (b)(15). The provision creates no 'substantive interest' in the residents vis-a-vis the Secretary.

"Moving to its minor premise, the majority postulates that a decision to decertify is tantamount to a decision to transfer individual residents. Practically, of course, this may be a consequence in most cases, at least where an institution fails to remedy its insufficiencies. Analytically, however, the two decisions are different. Decertification focuses on the institution's noncompliance with HEW's standards. The majority does not and cannot contend that recipients have a right to remain in an institution that the Secretary has found, by appropriate procedures, to be in substantial noncompliance with the standards. 'Transfer trauma,' although a legitimate concern for some residents, is necessarily subordinate to the threat posed to all residents by substandard conditions." *Id.*, at 295–296.

The Secretary of DPW filed a petition for certiorari, which we granted.[14] 441 U. S. 904. We now reverse, essentially for the reasons stated by Chief Judge Seitz in his dissent.

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[14] The patients urge us to dismiss the petition without reaching the merits on the ground that there is no one before the Court who may properly argue the petitioner's position. Thus, they contend that DPW is foreclosed from arguing here because, although its Secretary was formally an appellee in the Court of Appeals, it deliberately took a neutral position on the merits in that court. And they argue that HEW, which did argue the merits below, is foreclosed from arguing them here because its Secretary did not petition for certiorari. While we accept the patients' argument with respect to the portion of the injunction requiring continued payments for Medicaid patients, we reject it insofar as the main issue presented by the petition—the right of the patients to a pretermination hearing—is concerned.

When the District Court ruled against the patients and Town Court on their right to a pretermination hearing, it nevertheless ordered HEW and DPW to continue making payments for services actually rendered, no doubt to ensure that there would be no break in care or benefits while the patients were being transferred. The patients appealed on the hearing issue, but the HEW Secretary alone cross-appealed on the issue of whether HEW should continue paying benefits assuming that there was no right to a pretermination hearing. The DPW Secretary did not file a cross-appeal, thus accepting the District Court's order that DPW continue paying its share of benefits. Under these circumstances, the DPW Secretary's petition for certiorari could not revive the issue of the propriety of that order. And, since the HEW Secretary did not file a petition for certiorari, we have no occasion to review it now.

However, the patients' jurisdictional argument fails insofar as the hearing issue is concerned. Because it contributes funds to the Medicaid program and has joint supervisory responsibilities with the Federal Government over Medicaid providers, DPW clearly has a sufficient interest in this question to give it standing to argue the merits. And, since it was victorious in the District Court on this issue, there was no need for it to file an appeal in order to keep it alive. Finally, although we would not normally allow a party to make an argument it had not raised below, the fact that the same argument was vigorously asserted by HEW and fully addressed by the Court of Appeals removes any prudential barrier to review that might otherwise exist.

Because he was a party to the proceeding below, the HEW Secretary was automatically joined as a respondent when the DPW Secretary filed his petition in this Court. See this Court's Rule 21 (4). In that capacity, he

At the outset, it is important to remember that this case does not involve the question whether HEW or DPW should, as a matter of administrative efficiency, consult the residents of a nursing home before making a final decision to decertify it.[15] Rather, the question is whether the patients have an interest in receiving benefits for care in a particular facility that entitles them, as a matter of constitutional law, to a hearing before the Government can decertify that facility. The patients have identified two possible sources of such a right. First, they contend that the Medicaid provisions relied upon by the Court of Appeals give them a property right to remain in the home of their choice absent good cause for transfer and therefore entitle them to a hearing on whether such cause exists. Second, they argue that a transfer may have such severe physical or emotional side effects that it is tantamount to a deprivation of life or liberty, which must be preceded by a due process hearing.[16] We find both arguments unpersuasive.[17]

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may seek reversal of the judgment of the Court of Appeals on any ground urged in that court.

[15] As Judge Adams pointed out in his concurring opinion, HEW and DPW would no doubt benefit from patient input on the questions whether the facility meets the applicable standards and, if not, whether decertification should be postponed pending attempts to bring the home into compliance. 586 F. 2d, at 292–293. Indeed, HEW recognizes the value of patient input, requiring patient interviews to be conducted under some circumstances as a part of the periodic review of a facility's qualifications. See 42 CFR § 456.608 (1979). The fact that a person may be an important, or even critical, witness does not, however, give him a constitutional right to testify.

[16] The patients cite a number of studies indicating that removal to another home may cause "transfer trauma," increasing the possibility of death or serious illness for elderly, infirm patients. They also argue that associational interests, such as friendship among patients and staff and family ties, may be disrupted if the patients are scattered to other nursing homes, perhaps in other areas of the country. In denying the motion for a preliminary injunction, the District Court did not take evidence or make any findings on the harm that might result from a transfer. Never-

[*Footnote 17 is on p. 785*]

Whether viewed singly or in combination, the Medicaid provisions relied upon by the Court of Appeals do not confer a right to continued residence in the home of one's choice. Title 42 U. S. C. § 1396a (a)(23) (1976 ed., Supp. II) gives recipients the right to choose among a range of *qualified* providers, without government interference. By implication, it also confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified. But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified. Second, although the regulations do protect patients by limiting the circumstances under which a *home* may transfer or discharge a Medicaid recipient, they do not purport to limit the Government's right to make a transfer necessary by decertifying a facility.[18] Finally, since decerti-

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theless, we assume for purposes of this decision that there is a risk that some residents may encounter severe emotional and physical hardship as a result of a transfer.

[17] The patients also argue that they are third-party beneficiaries of the provider agreement between DPW and Town Court and that this status somehow entitles them to more than Town Court itself is entitled to—namely, a pretermination hearing. They also argue that a legitimate entitlement to continued care in the home of their choice arises out of Pennsylvania's long history of providing free medical care for those who are indigent. Nothing in the cited Pennsylvania statutes or court decisions, however, purports to create the kind of broad entitlement that the patients claim. In any event, neither of these state-law arguments was advanced in the courts below and therefore neither may provide the basis for an affirmance in this Court.

[18] This regulation is clearly designed to prevent abuses by providers and not to define the Government's obligations or limit its powers in any way. Although the regulation allows a home to transfer or discharge a patient for medical reasons, we may assume that the Government could not order a patient transferred out of a qualified facility simply because it believed such a transfer was medically indicated. In other words, we assume that the statute referred to above would prohibit any such interference with the patient's free choice among qualified providers.

fication does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in financial benefits are irrelevant.

In holding that these provisions create a substantive right to remain in the home of one's choice absent specific cause for transfer, the Court of Appeals failed to give proper weight to the contours of the right conferred by the statutes and regulations. As indicated above, while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified.

The Court of Appeals also erred in treating the Government's decision to decertify Town Court as if it were equivalent in every respect to a decision to transfer an individual patient. Although decertification will inevitably necessitate the transfer of all those patients who remain dependent on Medicaid benefits, it is not the same for purposes of due process analysis as a decision to transfer a particular patient or to deny him financial benefits, based on his individual needs or financial situation.

In the Medicare and the Medicaid Programs the Government has provided needy patients with both direct benefits and indirect benefits. The direct benefits are essentially financial in character; the Government pays for certain medical services and provides procedures to determine whether and how much money should be paid for patient care. The net effect of these direct benefits is to give the patients an opportunity to obtain medical services from providers of their choice that is comparable, if not exactly equal, to the opportunity available to persons who are financially independent. The Government cannot withdraw these direct benefits with-

out giving the patients notice and an opportunity for a hearing on the issue of their eligibility for benefits.[19]

This case does not involve the withdrawal of direct benefits. Rather, it involves the Government's attempt to confer an indirect benefit on Medicaid patients by imposing and enforcing minimum standards of care on facilities like Town Court. When enforcement of those standards requires decertification of a facility, there may be an immediate, adverse impact on some residents. But surely that impact, which is an indirect and incidental result of the Government's enforcement action, does not amount to a deprivation of any interest in life, liberty, or property.

Medicaid patients who are forced to move because their nursing home has been decertified are in no different position for purposes of due process analysis than financially independent residents of a nursing home who are forced to move because the home's state license has been revoked. Both groups of patients are indirect beneficiaries of government programs designed to guarantee a minimum standard of care for patients as a class. Both may be injured by the closing of a home due to revocation of its state license or its decertification as a Medicaid provider. Thus, whether they are private patients or Medicaid patients, some may have difficulty locating other homes they consider suitable or may suffer both emotional and physical harm as a result of the disruption associated with their move. Yet none of these patients would lose the ability to finance his or her continued care in a properly licensed or certified institution. And, while they might have a claim against the nursing home for damages,[20] none would have any claim against the responsible governmental authorities for the deprivation of an interest in life, liberty, or prop-

[19] 45 CFR § 205.10 (a) (5) (1979). See also *Goldberg* v. *Kelly*, 397 U. S. 254.

[20] This would, of course, depend on the contract between the patients and the nursing home, if any, and the provisions of the applicable state law.

erty. Their position under these circumstances would be comparable to that of members of a family who have been dependent on an errant father; they may suffer serious trauma if he is deprived of his liberty or property as a consequence of criminal proceedings, but surely they have no constitutional right to participate in his trial or sentencing procedures.

The simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally, provides a sufficient answer to all of the cases on which the patients rely in this Court. Thus, *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, involved the direct relationship between a publicly owned utility and its customers; the utility had provided its customers with a legal right to receive continued service as long as they paid their bills. We held that under these circumstances the utility's customers had a constitutional right to a hearing on a disputed bill before their service could be discontinued. But nothing in that case implies that if a public utility found it necessary to cut off service to a nursing home because of delinquent payments, it would be required to offer patients in the home an opportunity to be heard on the merits of the credit dispute. This would be true even if the termination of utility service required the nursing home to close and caused serious inconvenience or harm to patients who would therefore have to move. As in this case, such patients might have rights against the home, and might also have direct relationships with the utility concerning their own domestic service, but they would have no constitutional right to interject themselves into the dispute between the public utility and the home.[21]

[21] Similarly, in *Perry* v. *Sindermann*, 408 U. S. 593, and *Arnett* v. *Kennedy*, 416 U. S. 134, the Court was concerned with the direct relationship between a public employer and its employees. The character of that relationship determined whether the employee possessed an expectancy of continued employment that was legally enforceable against his employer—

Over a century ago this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:

> "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals."

More recently, in *Martinez* v. *California*, 444 U. S. 277, we rejected the argument made by the parents of a girl murdered by a parolee that a California statute granting absolute immunity to the parole board for its release decisions deprived their daughter of her life without due process of law:

> "A legislative decision that has an incremental impact on the probability that death will result in any given situation—such as setting the speed limit at 55-miles-per-hour instead of 45—cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander." *Id.*, at 281.

Similarly, the fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm.[22]

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or at least could not be terminated by the employer without observing certain minimal safeguards. But those cases raised no question concerning the right of an employee who loses his job as a result of government action directed against a third party.

[22] We, of course, need not and do not hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action. Conceivably, for example, if the Government were acting against one person for the purpose of punishing or restraining

Whatever legal rights these patients may have against Town Court for failing to maintain its status as a qualified skilled nursing home—and we express no opinion on that subject—we hold that the enforcement by HEW and DPW of their valid regulations did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring in the judgment.

Although the Court reaches the result I reach, I find its analysis simplistic and unsatisfactory. I write separately to explain why and to set forth the approach I feel should be followed.

The patients rest their due process claim on two distinct foundations. First, they assert a property interest in continued residence at their home. Second, they claim life and liberty interests tied to their physical and psychological well-being. According to the patients, because each of these interests is threatened directly by decertification, they are constitutionally entitled to a hearing on the propriety of that action. Unlike the Court, I find it necessary to treat these distinct arguments separately.

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another, the indirectly affected individual might have a constitutional right to some sort of hearing. But in this case the Government is enforcing its regulations against the home for the benefit of the patients as a whole and the home itself has a strong financial incentive to contest its enforcement decision; under these circumstances the parties suffering an indirect adverse effect clearly have no constitutional right to participate in the enforcement proceedings.

I

In my view, the Court deals far too casually with § 1902 (a)(23) of the Social Security Act, 42 U. S. C. § 1396 (a)(23) (1976 ed., Supp. II), in rejecting the patients' "property" claim.[1] That provision guarantees that a patient may receive nursing home care "from any institution . . . qualified to perform the . . . services . . . who undertakes to provide him such services." The statute thus vests each patient with a broad right to resist governmental removal, which can be disrupted only when the Government establishes the home's noncompliance with program participation requirements. Given this fact and our precedents, one can easily understand why seven judges of the Court of Appeals adopted the patients' argument. It would seem that, because the Government has generated a "justifiable expectation that [the patients] would not be transferred except for misbehavior or upon the occurrence of other specified events," *Vitek* v. *Jones*, 445 U. S. 480, 489 (1980), they are "entitled . . . to the benefits of appropriate procedures in connection with determining the conditions that warranted [their] transfer." *Id.*,

[1] I agree with the Court that 45 CFR § 205.10 (a)(5) (1979) does not help the patients. Even assuming that provision might otherwise be relevant, it merely prescribes procedures that must attend removal of a benefit. Thus, it has no bearing on whether a property interest exists. See *Bishop* v. *Wood*, 426 U. S. 341, 345, 347 (1976); Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 442–443, n. 232 (1977). I am less comfortable with the Court's treatment of 42 CFR § 442.311 (c) (1979), restated from 45 CFR § 249.12 (a)(1)(ii)(B)(4) (1976), which limits transfers by the home. After all, "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972). Since reliance can be generated by inhibitions on private, as well as governmental, alteration of the status quo, I am inclined to think that this provision, if applicable to Town Court, furnishes some support to the patients' claim of a protected expectancy. Accord, *Brede* v. *Director for Dept. of Health for Hawaii*, 616 F. 2d 407, 410–411 (CA9 1980).

at 490. Especially since the patients assert an interest in a home,[2] I believe their claim to property has substantial force.

I agree with Judge Adams of the Court of Appeals that it "begs the question," *Town Court Nursing Center, Inc.* v. *Beal*, 586 F. 2d 280, 287 (1978) (concurring opinion), to counter this argument with the observation that § 1396 (a)(23) expressly gives the patients only a right to stay in *qualified* facilities. See *ante*, at 785. We have repeatedly rejected as too facile an approach that looks no further than the face of the statute to define the scope of protected expectancies. See *Vitek* v. *Jones*, 445 U. S., at 490–491, and n. 6, citing *Arnett* v. *Kennedy*, 416 U. S. 134 (1974) (concurring and dissenting opinions); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 99 (1976) ("six Justices in *Arnett* must have looked outside the statute to consider the impact of government action on citizen expectations and reliance"). Here, as in numerous cases in which we have recognized protected interests, disqualification of the home is the very condition that alone permits disruption of the status quo and that the patients wish to contest. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 11–12 (1978) ("Because petitioners may terminate service only 'for cause,' respondents assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause") (footnote omitted).

Perhaps aware that its treatment of § 1396 (a)(23) is in some tension with our precedents, the Court launches another

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[2] It is well recognized that the Due Process Clauses of the United States Constitution grew out of the "law of the land" provision of Magna Carta and its later manifestations in English statutory law. That the home was at the center of those property interests historically sought to be protected by due process is underscored by the fact the phrase "due process of law" first appeared in the following codification: "No man of what state or condition he be, shall be *put out of his lands or tenements* nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." 28 Edw. III, ch. 3 (1354) (emphasis added), as quoted in The Constitution of the United States of America, Analysis and Interpretation 1138 (Cong. Research Serv. 1973).

line of analysis. It reasons that "decertification . . . is not the same for purposes of due process analysis as a decision to transfer a particular patient." *Ante*, at 786. I am left wondering why. Certainly, the "real world" effect of the two actions is the same. Thus the Court's assertion will come as cold comfort to patients forced to relocate because of this decision. I also wonder why this analytical differentiation matters in determining whether the patients possess a constitutionally protected interest. Certainly decertification results in the loss of exactly the same interest—the ability to stay in one's home—that a patient subject to an individual transfer suffers. The Court does not explain to my satisfaction why in the latter case, but not in the former, a constitutionally protected interest is affected.

I have no quarrel with the Court's observation that the Due Process Clause generally is unconcerned with "indirect" losses. I fear, however, that such platitudes often submerge analytical complexities in particular cases. Cf. *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963); *Braunfeld* v. *Brown*, 366 U. S. 599, 607 (1961) (plurality opinion); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 461 (1958); *American Communications Assn.* v. *Douds*, 339 U. S. 382, 402 (1950). I also question whether that generalization has relevance here.[3] Even assuming it does, the Court's treatment of it

[3] It seems to me that the indirect character of a harm at least normally has to do with whether state action has "deprived" a person of a protected interest, not with whether a protected interest exists. Thus, in *Martinez* v. *California*, 444 U. S. 277 (1980), a case relied on by the Court, there was no question that the interest destroyed, a woman's life, was constitutionally protected. The Court concluded, however, that the loss of that life was "too remote a consequence" of government conduct to be deemed a deprivation attributable to state action. *Id.*, at 285. I would similarly distinguish the Court's "errant father" and "unpaid utility" hypotheticals as instances where no governmental deprivation occurred. Since the deprivation issue was neither briefed in this Court nor addressed below, I think there is a serious question whether the Court's inquiry into the indirect character of the patient's loss has any place in this case.

leaves me unimpressed. To say that the decertification decision directly affects the home is not to say that it "indirectly" affects the patients. Transfer is not only the "inevitabl[e]," *ante*, at 786, clearly foreseeable consequences of decertification; a basic *purpose* of decertification is to force patients to relocate. Thus, not surprisingly, § 1396 (a)(23) specifically ties the patients' right to continued residence in a home to qualification of the facility. Under these circumstances, I have great difficulty concluding that the patients' loss of their home should be characterized as "indirect and incidental," *ante*, at 787, "consequential," *Meyer* v. *Richmond*, 172 U. S. 82, 94 (1898); "collateral," see *Hannah* v. *Larche*, 363 U. S. 420, 443 (1960); or "remote and indeterminate," *Goodrich* v. *Detroit*, 184 U. S. 432, 437 (1902).[4] To be sure, decertification-induced transfers are designed to benefit patients. See *ante*, at 787. But so are a wide range of other governmental acts that invoke due process protections for the intended beneficiary. See, *e. g.*, *Vitek* v. *Jones*, *supra*; *Parham* v. *J. R.*, 442 U. S. 584 (1979). See also *In re Gault*, 387 U. S. 1 (1967). Indeed a basic purpose of affording a hearing in such cases is to test the Government's judgment that its action will in fact prove to be beneficial.

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[4] Because the "indirectness" of a result inevitably is a question of degree, and because countervailing considerations are likely to appear, I would prefer to treat "indirectness" as, at most, but one factor in the "property interest" calculus, which carries greater or lesser significance depending on the particular case. If I were to agree that the sole question here is whether the patients' loss must be rigidly characterized as either "indirect" or "direct," I doubt that I would reach the result the Court does. And if I did, I would undoubtedly rely on the policy-informed factors identified hereinafter, rather than on an essentially *ipse dixit* judgment informed by strained analogies. This would be so whether the relevant inquiry was whether a property interest exists or whether a deprivation had occurred. Cf. Monaghan, 62 Cornell L. Rev., at 428 (existence of "deprivation . . . depends . . . on such matters as the nature of the invasion, its magnitude, and the character of the justification asserted").

In my view, there exists a more principled and sensible analysis of the patients' "property" claim. Given § 1396 (a) (23), I am forced to concede that the patients have some form of property interest in continued residence at Town Court. And past decisions compel me to observe that where, as here, a substantial restriction inhibits governmental removal of a presently enjoyed benefit, a property interest normally will be recognized.[5] To state a general rule, however, is not to decide a specific case. The Court never has held that *any* substantive restriction upon removal of *any* governmental benefit gives rise to a generalized property interest in its continued enjoyment. Indeed, a majority of the Justices of this Court are already on record as concluding that the term "property" sometimes incorporates limiting characterizations of statutorily bestowed interests. See *Arnett* v. *Kennedy*, 416 U. S. 134 (1974) (plurality opinion); *Goss* v. *Lopez*, 419 U. S. 565, 586–587, and n. 4 (1975) (dissenting opinion). See also *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 856, 860–861 (1977) (opinion concurring in judgment). See generally Van Alstyne, Cracks in

[5] See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 11 (1978) (receipt of services from public utility not terminable except for "good and sufficient cause"); *Bishop* v. *Wood*, 426 U. S., at 345, n. 8 (finding determinative that public employment was terminable "at will," rather than for cause); *Goss* v. *Lopez*, 419 U. S. 565, 573–574 (1975) (public education must be continued absent "misconduct"); *Board of Regents* v. *Roth*, 408 U. S., at 578 (distinguishing situation where nonrenewal of state college professor's employment authorized only for "sufficient cause"); *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970) (public support payments to be continued unless recipient not qualified). See also *Vitek* v. *Jones*, 445 U. S. 480, 488–491 (1980); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 9–11 (1979); *Montanye* v. *Haymes*, 427 U. S. 236, 242 (1976); *Meachum* v. *Fano*, 427 U. S. 215, 226–227 (1976); *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974); *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973); *Morrissey* v. *Brewer*, 408 U. S. 471 (1972). See generally *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276 (1856) (Fifth Amendment "cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will").

"The New Property" Adjudicative Due Process in the Administrative State, 62 Cornell L. Rev. 445, 460–466 (1977). Common sense and sound policy support this recognition of some measure of flexibility in defining "new property" expectancies. Public benefits are not held in fee simple. And even if we analogize the patients' claim to "continued residence" to holdings more familiar to the law of private property—even to interests in homes, such as life tenancies—we would find that those interests are regularly subject to easements, conditions subsequent, possibilities of reverter, and other similar limitations. In short, it does not suffice to say that a litigant holds property. The inquiry also must focus on the dimensions of that interest. See *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972).

The determinative question is whether the litigant holds such a legitimate "claim of entitlement" that the Constitution, rather than the political branches, must define the procedures attending its removal. *Id.*, at 578. Claims of entitlement spring from expectations that are "justifiable," *Vitek* v. *Jones*, 445 U. S., at 489; "protectible," *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 7 (1979); "sufficient," *Bishop* v. *Wood*, 426 U. S. 341, 344 (1976); or "proper," *id.*, at 362 (dissenting opinion). In contrast, the Constitution does not recognize expectancies that are "unilateral," *Board of Regents* v. *Roth*, 408 U. S., at 577, or "too ephemeral and insubstantial." *Meachum* v. *Fano*, 427 U. S. 215, 228 (1976).

To mouth these labels does not advance analysis far. We must look further to determine which set of labels applies to particular constellations of fact. Whether protected entitlements exist and how far they extend, although dependent on subconstitutional rules, see, *e. g.*, *Bishop* v. *Wood*, *supra*, are ultimately questions of constitutional law. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S., at 9; Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 435–436 (1977). Application of that law will seldom pose difficulties

when the Government has exercised its option to bestow a benefit wholly at will, see *Bishop* v. *Wood*, *supra*, or the litigant has identified a "for cause" condition resembling those held to be property-creating in past cases. Cases, however, will not always fit neatly into these categories. And when such cases arise, some new analysis is needed. In my view, that inquiry should be broad-gauged. Reason and shared perceptions should be consulted to define the scope of the claimant's "justifiable" expectations. Nor should constitutional policy be ignored in deciding whether constitutional protections attach. This approach not only permits sensible application of due process protections; it reflects the unremarkable reality that reasonable legal rules themselves comport with reasonable expectations.

In applying this analysis to this case, four distinct considerations convince me that—even though the statutes place a significant substantive restriction on transferring patients—their expectancy in remaining in their home is conditioned upon its status as a qualified provider.

(1) The lengthy process of deciding the disqualification question has intimately involved Town Court. The home has been afforded substantial procedural protections, and, throughout the process, has shared with the patients who wish to stay there an intense interest in keeping the facility certified. These facts are functionally important. Procedural due process seeks to ensure the accurate determination of decisional facts, and informed, unbiased exercises of official discretion. See, *e. g.*, *Fuentes* v. *Shevin*, 407 U. S. 67, 81 (1972); *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972). To the extent procedural safeguards achieve these ends, they reduce the likelihood that persons will forfeit important interests without sufficient justification. In this case, since the home had the opportunity and incentive to make the very arguments the patients might make, their due process interest in accurate and informed decisionmaking already, in large measure, was satisfied. This point embodies more than

an abstract argument of policy. "[T]he rights of parties are habitually protected in court by those who act in a representative capacity." *Voeller* v. *Neilston Warehouse Co.*, 311 U. S. 531, 537 (1941). See also *New Orleans Debenture Redemption Co.* v. *Louisiana*, 180 U. S. 320 (1901); *Bernheimer* v. *Converse*, 206 U. S. 516, 532 (1907). Thus, not surprisingly the Court heretofore has recognized that where known rules provide procedures through which we may expect others to protect a property holder's less directly threatened interests, that fact favors viewing compliance with those procedures as defining the outer limits of the property holder's expectancy. See *Kersh Lake Dist.* v. *Johnson*, 309 U. S. 485 (1940); *McCaughey* v. *Lyall*, 224 U. S. 558 (1912).

(2) Town Court is more than a *de facto* representative of the patients' interests; it is the underlying source of the benefit they seek to retain. Again, this fact is important, for the property of a recipient of public benefits must be limited, as a general rule, by the governmental power to remove, through prescribed procedures, the underlying source of those benefits. The Constitution would not have entitled John Kelly to a fair hearing if New York had chosen to disband its public assistance programs rather than to cut off his particular award. See *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). Nor would Texas have had to afford process to Professor Sindermann had it decided for budgetary reasons to close Odessa Junior College. See *Perry* v. *Sindermann*, 408 U. S. 593 (1972). And we would be surprised to learn that Dwight Lopez had a constitutional right to procedures before the Ohio Department of Education suspended classes at Columbus High School for 10 days due to the discovery of faulty electrical wiring requiring that much time for repair work. See *Goss* v. *Lopez*, 419 U. S. 565 (1975). These observations comport with common understanding and shared expectations. A farmer may sue for conversion if his upstream neighbor improperly diverts his water. But both can

only grumble if the spring rains cease and the river runs dry.[6]

(3) That the asserted deprivation of property extends in a nondiscriminatory fashion to some 180 patients also figures in my calculus. See *Dent* v. *West Virginia*, 129 U. S. 114, 124 (1889) (legislation comports with due process if, among other things, "it be general in its operation upon the subjects to which it relates"). "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meet-

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[6] This common-sense notion is supported by the Court's holding nearly a century ago in *Fox* v. *Cincinnati*, 104 U. S. 783 (1882). Ohio had dredged the Miami and Erie Canal which had one of its termini at the Ohio River in Cincinnati. Pursuant to statutory authority, the State entered into contracts with owners of land bordering the canal. Under these contracts, the State provided the landowners with water to generate hydraulic power in return for rents. Fox leased water from the State in 1855. In 1863, the State granted Cincinnati a portion of the canal so that a street might be laid. The city built the street, and Fox, alleging that the project ruined his lease, sued the city. The city responded that the State had implicitly rescinded Fox's lease by abandoning the canal. Fox replied that, if this were so, the grant was void because it deprived him of property without due process of law and without just compensation. *Id.*, at 785.

The Court perceived the issue to be "whether there is anything in the lease . . . which prevents the State from making such an abandonment." *Ibid.* It answered the question in the negative. The State could abandon the canal whenever the "public necessities" justified abandonment. *Ibid.* No specific provision in the lease was required "because the right to abandon followed necessarily from the right to build. . . . Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the State to discontinue its canal and stop his supply of water." *Id.*, at 786. See *Kirk* v. *Providence Mill Co.*, 279 U. S. 807 (1929); *Kirk* v. *Maumee Valley Co.*, 279 U. S. 797 (1929). If a State may abandon a canal without invading the "property" of a lessee of its waters, it also generally may "abandon" a college, *Perry* v. *Sindermann*, 408 U. S. 593 (1972), or a high school, *Goss* v. *Lopez*, 419 U. S. 565 (1975), or a nursing home Medicaid provider.

ing or an assembly of the whole." *Bi-Metallic Investment Co.* v. *State Board*, 239 U. S. 441, 445 (1915). See *Bowles* v. *Willingham*, 321 U. S. 503, 519–520 (1944); *Goodrich* v. *Detroit*, 184 U. S., at 438. When governmental action affects more than a few individuals, concerns beyond economy, efficiency, and expedition tip the balance against finding that due process attaches.[7] We may expect that as the sweep of governmental action broadens, so too does the power of the affected group to protect its interests outside rigid constitutionally imposed procedures.[8] Moreover, "the case for due

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[7] The need for expeditious removal of patients from unsafe and unhealthful homes surely is substantial. See Lieberman, Relocation Research and Social Policy, 14 The Gerontologist 494, 500 (1974) ("Taking individuals out of environments that were sterile and barren and putting them into environments that were more humanizing and demanding produced positive results"). And providing procedures at the usual "meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965), will inevitably delay beneficial transfer of some nursing home residents. See Brown, An Appraisal of the Nursing Home Enforcement Process, 17 Ariz. L. Rev. 304, 337 (1975) ("While the cases granting a prior hearing [to nursing home operators] seem to reflect judicial concern for the consequences of the proposed action on the patients of the affected facility, the effect has been to allow patients to remain in seriously deficient homes undercutting enforcement activities aimed at remedying these deficiencies"); *id.*, at 338 ("because the homes may be expected to use any available delaying tactics, the process proceeds at a snail's pace").

[8] "General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Investment Co.* v. *State Board*, 239 U. S. 441, 445 (1915). Of course, we cannot ignore that this generalization does not always work well in practice. Thus, the Court has recognized that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938). While nursing home patients may indeed make up a "minority," they are not so much the victims of social prejudice as of physical

process protection grows stronger as the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decisionmaker's purview. For when government acts in a way that singles out identifiable individuals—in a way that is likely to be premised on suppositions about specific persons—it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with.*" L. Tribe, American Constitutional Law § 10–7, pp. 503–504 (1978) (emphasis in original). I agree with this general statement and find its "flipside" informative here.

(4) Finally, I find it important that the patients' interest has been jeopardized not at all because of alleged shortcomings on their part. Frequently, significant interests are subjected to adverse action upon a contested finding of fault, impropriety, or incompetence. In these contexts the Court has seldom hesitated to require that a hearing be afforded the "accused." See, *e. g., Dixon* v. *Love,* 431 U. S. 105, 112–113 (1977); *Goss* v. *Lopez,* 419 U. S. 565 (1975); *Wolff* v. *McDonnell,* 418 U. S. 539 (1974); *Arnett* v. *Kennedy,* 416 U. S. 134 (1974). This tendency reflects due process values extending beyond the need for accurate determinations. Affording procedural protections also aims at "'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall* v. *Jerrico, Inc.,* 446 U. S. 238, 242 (1980), quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 172 (1951) (concurring opinion). It may be that patients' participation in the decertification decision would vaguely heighten their and others' sense of the decision's legitimacy, even though the decision follows

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infirmity and social neglect. Moreover, concerned friends and relatives or organized interest groups may, and often do, step forward to protect the interests of nursing home patients.

extensive government inspections undertaken with the very object of protecting the patients' interests. Even so, that interest is far less discernible in this context than when a stigmatizing determination of wrongdoing or fault supplements removal of a presently enjoyed benefit. See, *e. g.*, *Goss* v. *Lopez*, 419 U. S., at 574–575. See also *Vitek* v. *Jones*, 445 U. S. 480 (1980).

For these reasons, I am willing to recognize in this case that "the very legislation which 'defines' the 'dimension' of the [patient's] entitlement, while providing a right to [remain in a home] generally, does not establish this right free of [disqualification of the home] in accord with [federal statutory] law." *Goss* v. *Lopez*, 419 U. S., at 586–587 (dissenting opinion).[9]

II

Citing articles and empirical studies, the patients argue that the trauma of transfer so substantially exacerbates mortality rates, disease, and psychological decline that decertification deprives them of life and liberty.[10] Although the

[9] Although basic analytical differences divide the Court and me, I am heartened by the Court's seeming recognition that most, if not all, of the factors I have identified and explained may figure, in future cases, in due process analysis. See *ante*, at 789–790, n. 22.

[10] I question whether the life and liberty issue decided by the Court is properly presented. The District Court refused to extend a preliminary injunction after a brief hearing. In that court, the plaintiffs only touched on the concept of transfer trauma. There was no explicit argument that the patients were threatened with a deprivation of life or liberty; rather, the danger of transfer trauma was noted only as a circumstance raising a likelihood of irreparable injury justifying injunctive relief. See Memorandum of Law in Support of Application for Temporary Restraining Order and Motion for Preliminary Injunction (filed July 20, 1977) (asserting only "taking of property without due process"). The transfer trauma studies cited to this Court were not cited to the District Judge. Testimony regarding transfer trauma was limited to the little-explained assertion of an expert witness that removal would subject some patients in the group to endangerment of their lives or aggravation of their ill-

Court assumes that "transfer trauma" exists, see *ante*, at 784, and n. 16, it goes on to reject this argument. By focusing solely on the "indirectness" of resulting physical and psychological trauma, the Court implies that regardless of the degree of the demonstrated risk that widespread illness or even death attends decertification-induced transfers, it is of no moment. I cannot join such a heartless holding. Earlier this Term, the Court recognized that a liberty interest emanates even from the likelihood that added stigma or harmful treatment might attend transfer from a prison to a mental hospital. *Vitek* v. *Jones, supra;* see also *Parham* v. *J. R.*, 442 U. S., at 601. For me it follows easily that a governmental decision that imposes a high risk of death or serious illness on identifiable patients must be deemed to have an impact on their liberty.[11] Nor am I soothed by the palliative that this harm is "indirect"; in my view, where such drastic consequences attend governmental action, their foreseeability, at least generally, must suffice to require input by those who must endure them. See *Brede* v. *Director for Dept. of Health for Hawaii*, 616 F. 2d 407, 412 (CA9 1980).[12]

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nesses. App. 252a–253a. In the Court of Appeals, the patients again did not contend that decertification exposed them to a deprivation of life or liberty. See Reply Brief for Appellants in No. 77-2221 et al. (CA3), p. 10 (raising only "property interest" argument). It is to be remembered that this case arises from the refusal to extend a preliminary injunction—an order preceded by limited development of the record and not guided by focused presentation of legal arguments. "[T]his Court above all others must limit its review of interlocutory orders." *Goldstein* v. *Cox*, 396 U. S. 471, 478 (1970).

[11] Blackstone, whose vision of liberty unquestionably informed the Framers of the Bill of Rights, see *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 424 (1979) (opinion concurring in part and dissenting in part), wrote that "[t]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, *his health*, and his reputation." 1 W. Blackstone, Commentaries *129 (emphasis added).

[12] The Court observes that "the fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not

The fact of the matter, however, is that the patients cannot establish that transfer trauma is so substantial a danger as to justify the conclusion that transfers deprive them of life or liberty. Substantial evidence suggests that "transfer trauma" does not exist, and many informed researchers have concluded at least that this danger is unproved.[13] Recognition of a constitutional right plainly cannot rest on such an inconclusive body of research and opinion. It is for this reason, and not for that stated by the Court, that I would reject the patients' claim of a deprivation of life and liberty.

III

Few statements are more familiar to judges than Holmes' pithy observation that "hard cases make bad law." I fear that the Court's approach to this case may manifest the perhaps equally valid proposition that easy cases make bad law. Sometimes, I suspect, the intuitively sensed obviousness of a case induces a rush to judgment, in which a convenient rationale is too readily embraced without full consideration of its internal coherence or future ramifications. With re-

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turn the decertification into a governmental decision to impose that harm." *Ante*, at 789. I question the relevance of this observation. When the government erroneously commits a person to a mental hospital, it is not "deci[ding] to impose . . . harm" either. But we have recognized that the risk that such action "may lead to severe hardship" is sufficiently great to justify a hearing for the transferee. *Vitek* v. *Jones*, 445 U. S. 480 (1980).

[13] See Borup, Gallego, & Heffernan, Relocation and its Effect on Mortality, 19 The Gerontologist 135, 136 (1979) (noting that 6 previous studies found increased mortality rates, while 12 did not: "findings have been ambiguous and appear to be contradictory"); *id.*, at 138 (concluding on basis of new study that "relocation does not increase the probability of mortality"); Bourestom & Tars, Alterations in Life Patterns Following Nursing Home Relocation, 14 The Gerontologist 506 (1974); Lieberman, Relocation Research and Social Policy, 14 The Gerontologist 494, 495 (1974).

spect, I express my concern that that path has been followed here.

I concur in the judgment.

MR. JUSTICE BRENNAN, dissenting.

Respondents have a constitutionally protected property interest in their " 'legitimate entitlement to continued residency at the home of [their] choice absent specific cause for transfer.' " *Town Court Nursing Center, Inc.* v. *Beal*, 586 F. 2d 280, 286 (CA3 1978) (Adams, J., concurring), quoting *Klein* v. *Califano*, 586 F. 2d 250, 258 (CA3 1978). The statutory and regulatory scheme gives a patient the right to choose any qualified nursing home. 42 U. S. C. §§ 1395a and 1396a (a) (23) (1976 ed., Supp. II). Once a patient has chosen a facility, the scheme carefully protects against undesired transfers by limiting the circumstances under which a home may transfer patients. 42 CFR § 442.311 (c) (1979). And a qualified nursing home, which must have met detailed federal requirements to gain certification, 42 U. S. C. §§ 1395x (j) (1976 ed. and Supp. II) and 1396a (a)(28), cannot be decertified unless the Government can show good cause. See 42 U. S. C. § 1395cc (b)(2) (1976 ed., Supp. II). Thus the scheme is designed to enable a patient to stay in the chosen home unless there is a specific reason to justify a transfer.

Respondent patients chose a home which was, at the time, qualified. They moved into the home reasonably expecting that they would not be forced to move unless, for some sufficient reason, the home became unsuitable for them. The Government's disqualification of the home is, of course, one such reason. Respondents have no right to receive benefits if they choose to live in an unqualified home. That does not mean, however, that they have no right to be heard on the question whether the home is qualified—the answer to which will determine whether they must move to another home and suffer the allegedly great ills encompassed by the term "transfer trauma." See *ante*, at 784–785, n. 16. The Government's

action in withdrawing the home's certification deprives them of the expectation of continued residency created by the statutes and regulations. Under our precedents, they are certainly "entitled . . . to the benefits of appropriate procedures" in connection with the decertification. *Vitek* v. *Jones*, 445 U. S. 480, 490 (1980); *Perry* v. *Sindermann*, 408 U. S. 593 (1972).*

The requirements of due process, to be sure, are flexible and are meant to be practical. See *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); *Morrissey* v. *Brewer*, 408 U. S. 471 (1972). Here, the provider is entitled to formal proceedings in connection with the disqualification of the home. To the extent that patients want to remain in a home, their interests very nearly coincide with the home's own interests. The patients can count on the home to argue that it should not be disqualified. Nevertheless, the patients have some interests which are separate from the interests of the provider, and they could contribute some information relevant to the decertification decision if they were given an opportunity. See *ante*, at 784, n. 15. There is no indication that the patients have been accorded any opportunity to present their views on decertification. Because they were accorded no procedural protection, I dissent.

*It is no answer to say that respondents' only right is to stay in a *qualified* home, *ante*, at 785, because whether the home is qualified is precisely the issue to be determined. Nor is it an answer to say that respondents are third parties not "directly" affected by the governmental action. *Ante*, at 786–788. As the Court admits, the regulatory scheme operates for the direct benefit of the patients, *ante*, at 789–790, n. 22, and it generates expectations and reliance just as deserving of protection as other statutory entitlements.

Syllabus

MOHASCO CORP. *v.* SILVER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-616. Argued March 25, 1980—Decided June 23, 1980

Section 706 (c) of the Civil Rights Act of 1964 (Act) provides that in the case of an alleged unlawful employment practice occurring in a State having a law prohibiting such practices no charge may be "filed" with the Equal Employment Opportunity Commission (EEOC) before the expiration of 60 days after proceedings have been commenced in the appropriate state agency unless such proceedings have been earlier terminated. Section 706 (e) requires that an unlawful employment practice charge be "filed" in such a State within 300 days after the alleged practice occurred or within 30 days after the aggrieved person receives notice that the state agency has terminated its proceedings, whichever is earlier. Petitioner employer discharged respondent employee on August 29, 1975. On June 15, 1976—291 days later—the EEOC received a letter from respondent claiming that petitioner had discriminated against him because of his religion, and this letter was promptly referred to the appropriate New York agency, which in due course determined that there was no merit to the charge. Meanwhile, on August 20, 1976—more than 60 days after respondent's letter had been submitted to the EEOC and 357 days after respondent's discharge—the EEOC notified petitioner that respondent had filed an employment discrimination charge. About a year later, on August 24, 1977, the EEOC issued its determination that there was no reasonable cause to believe respondent's charge was true and notified respondent that he had a statutory right to file a private action. Respondent then commenced such an action 91 days later in Federal District Court. Granting summary judgment for petitioner, the District Court held that § 706 (c) precluded any filing with the EEOC until a date 60 days after June 15, 1976, and because that date was 51 days beyond § 706 (e)'s 300-day time limit for filing in so-called "deferral States," the charge was not timely filed. The Court of Appeals reversed, holding that the District Court's literal reading of the Act did not give sufficient weight to the Act's overriding purpose of insuring that employment discrimination is redressed, that it was necessary to conclude that a charge is "filed" for purposes of § 706 (e) when received, and "filed" as required by § 706 (c) when the state deferral period ends, and that therefore the letter received by the EEOC

on June 15, 1976, had been filed within 300 days as required by § 706 (e) but had not been filed during the 60-day deferral period for purposes of § 706 (c).

Held: A literal reading of §§ 706 (c) and (e) so as to give the word "filed" the same meaning in both subsections gives full effect to the several policies reflected in the Act. Under this literal reading, respondent's charge was not timely filed, because it was "filed" on the 351st day (60 days after June 15, 1976, or the earliest date upon which the EEOC could allow the charge to be filed), by which time the applicable 300-day limitations period had run. Pp. 815–826.

(a) The Act's legislative history is entirely consistent with the wording of the Act itself, there being nothing to indicate that complainants in some States were to be allowed to proceed with less diligence than those in other States or to give deferral state complainants any advantage over nondeferral state complainants with respect to the time for filing unlawful employment practice charges. Pp. 818–824.

(b) A literal reading of the statute is not unfair to victims of employment discrimination who often proceed without the assistance of counsel. P. 825.

(c) There is no merit to respondent's argument based on the EEOC's interpretation, since that agency's interpretation cannot supersede the language chosen by Congress. P. 825.

(d) Nor is there any merit to the argument that a less literal reading of the statute allowing the EEOC to treat a letter received on the 291st day as "filed" and interpreting § 706 (c)'s prohibition as merely requiring the EEOC to postpone any action on a charge for at least 60 days, would adequately effectuate the policy of deferring to state agencies. Congress clearly intended to encourage the prompt processing of all employment discrimination charges. To accept respondent's position would add a 60-day period to the schedule mandated by Congress and would unreasonably give the word "filed" two different meanings in the same section of the Act. Pp. 825–826.

602 F. 2d 1083, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 826.

Thomas Mead Santoro **argued the cause for petitioner. With him on the briefs was** ***Francis J. Holloway.***

Judith P. Vladeck argued the cause for respondent. With her on the brief was *Sheldon Engelhard*. *Edwin S. Kneedler* argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Assistant Attorney General Days, Deputy Solicitor General Claiborne, Leroy D. Clark, Joseph T. Eddins,* and *Lutz Alexander Prager*.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question in this Title VII case is whether Congress intended the word "filed" to have the same meaning in subsections (c)[1] and (e)[2] of § 706 of the Civil Rights Act of 1964,

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**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

[1] "In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority." 86 Stat. 104.

[2] "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice

78 Stat. 260, as amended in 1972, 86 Stat. 104–105, 42 U. S. C. §§ 2000e–5 (c) and (e). The former subsection prohibits the filing of an unfair employment practice charge with the federal Equal Employment Opportunity Commission (EEOC) until after a state fair employment practices agency has had an opportunity to consider it. The latter subsection requires that in all events the charge must be filed with the EEOC within 300 days of the occurrence. We hold that a literal reading of the two subsections gives full effect to the several policies reflected in the statute.

On August 29, 1975, Mohasco Corp. discharged the respondent from his position as senior marketing economist.[3] On June 15, 1976—291 days later—the EEOC received a letter from respondent asserting that Mohasco had discriminated against him because of his religion. The letter was promptly referred to the New York State Division of Human Rights. That state agency reviewed the matter[4] and, in due course, determined that there was no merit in the charge.[5]

Meanwhile, on August 20, 1976—a date more than 60 days after respondent's letter had been submitted to the EEOC and

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or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency." 86 Stat. 105.

[3] According to respondent's complaint, he holds a master's degree in economics from Columbia University. Record Item No. 1, p. 3.

[4] The District Court stated that "[t]he period of limitation for filing a complaint with the New York State Division of Human Rights is one year. N. Y. Exec. Law § 297 (5) (McKinney Supp. 1977)." App. to Pet. for Cert. A14.

[5] The determination by the New York State Division of Human Rights that there was no probable cause to believe Mohasco had engaged in the discriminatory conduct described by respondent was issued on February 9, 1977. That determination was upheld by order of the New York State Human Rights Appeal Board on December 22, 1977.

357 days after respondent's discharge—the EEOC notified Mohasco that respondent had filed a charge of employment discrimination.[6]

About a year later, on August 24, 1977, the EEOC issued its determination that "there is not reasonable cause to believe the charge is true," [7] and formally notified respondent that if he wished to pursue the matter further, he had a statutory right to file a private action in a federal district court within 90 days.[8] Respondent commenced this litigation 91 days later [9] in the United States District Court for the Northern District of New York.[10]

The District Court granted Mohasco's motion for summary judgment on the ground that respondent's failure to file a

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[6] The notice was on a printed form which merely advised Mohasco of the name of the charging party, the date of the alleged violation, and that the nature of the charge was an alleged discharge on the basis of religion. The notice further advised Mohasco that "[b]ecause of the Commission's volume of pending work, we are unable to tell you when we are able to schedule investigation of this charge . . . ." App. 18. One might therefore infer that as of 1976, the EEOC had not overcome its enormous backlog as documented in 1971. See H. R. Rep. No. 92–238, p. 64 (1971), Legislative History of Equal Employment Opportunity Act of 1972 (Committee Print compiled for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor), p. 124 (1972) (hereinafter 1972 Leg. Hist.); S. Rep. No. 92–415, p. 23, 1972 Leg. Hist. 432; *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 369, n. 24.

[7] App. to Pet. for Cert. A49.

[8] App. 19.

[9] Petitioner did not assert respondent's failure to file the action within 90 days as a defense.

[10] The *pro se* complaint prayed for an injunction against alleged continuing unlawful employment practices, compensatory damages against Mohasco and several of its executives jointly and severally in the sum of $100,000, and punitive damages against Mohasco in the sum of $1 million and against each individual defendant in the sum of $100,000. Record Item No. 1, p. 19. The District Court dismissed the complaint against the individual defendants on the ground that they had not been named in the original charge. The validity of that dismissal is not before us.

timely charge with the EEOC deprived the court of subject-matter jurisdiction. The court concluded that June 15, 1976 (the 291st day), could not be treated as the date that respondent's charge was "filed" with the EEOC, because § 706 (c) provides that in States which have their own fair employment practice agencies—and New York is such a State—"no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . ." Since no proceedings had been commenced before the New York agency prior to June 15, 1976, and since the proceedings that were commenced at that time did not terminate within 60 days, the District Court read § 706 (c) as precluding any filing with the EEOC until 60 days after June 15, 1976.[11] Because that date was 51 days beyond § 706 (e)'s 300-day time limit for filing in so-called "deferral States," the charge was not timely filed.

The District Court refused to apply an EEOC regulation[12]

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[11] The District Court noted that the EEOC's letter forwarding respondent's charge to the state agency had stated that the EEOC would automatically file the charge *"at the expiration date of the deferral period,* unless the EEOC was notified of an earlier termination of proceedings by the Division of Human Rights." App. to Pet. for Cert. A15 (emphasis in original). Thus, the Court concluded that the EEOC itself did not deem the charge filed until 60 days after June 15, 1976. *Ibid.*

[12] Title 29 CFR § 1601.12 (b)(1)(v)(A) (1977) states:

"In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceedings prior to the 300th day following the alleged act of discrimination, without notification to the Commission of such termination, the Commission will consider the charge to be filed with the Com-

that would have treated respondent's charge as timely because it was submitted to the EEOC within 300 days of the practice complained of and also within the applicable New York limitations period.[13] The District Court held that the regulation was contrary to the plain language of the statute, and in any event, had not been followed by the EEOC itself in this case.[14]

Over the dissent of Judge Meskill, the Court of Appeals for the Second Circuit reversed. 602 F. 2d 1083 (1979). It recognized that the District Court had read the statute literally, but concluded that a literal reading did not give sufficient weight to the overriding purpose of the Act. In the majority's view, in order to be faithful to "the strong federal policy in insuring that employment discrimination is redressed," *id.*, at 1087, it was necessary "to conclude that a charge is 'filed' for purposes of § 706 (e) when received, and 'filed' as required by § 706 (c) when the state deferral period ends." *Ibid.* By giving the word "filed" two different meanings, the court concluded that the letter received by the EEOC on June 15, 1976, had been filed within 300 days as required by § 706 (e),[15] but had not been filed during the 60-day deferral period for purposes of § 706 (c).

Judge Meskill believed that a literal reading of the statute was not only consistent with its basic purpose, but was also warranted by the additional purpose of "requir[ing] prompt action on the part of Title VII plaintiffs." 602 F. 2d, at 1092. He noted that Congress had imposed a general requirement of filing within 180 days, and that the exceptional period of 300 days for deferral States was merely intended to give the charging party a fair opportunity to invoke his state remedy with-

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mission on the date the person making the charge is notified of the termination."

A current regulation to substantially the same effect is found at 29 CFR §§ 1601.13 (a), (c), (d)(2)(iii) (1979).

[13] See n. 4, *supra.*

[14] App. to Pet. for Cert. A15. See n. 11, *supra.*

[15] The 300-day period expired on June 24, 1976.

out jeopardizing his federal rights; the exception was not intended to allow residents of deferral States to proceed with less diligence than was generally required.

Because there is a conflict among the Courts of Appeals on the proper interpretation of the word "filed" in this statute,[16]

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[16] The decision of the Court of Appeals in this case is consistent with the decision of the Tenth Circuit in *Vigil* v. *American Tel. & Tel. Co.*, 455 F. 2d 1222 (1972), but is in conflict with the decision of the Seventh Circuit in *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811 (1972). *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723 (CA6 1972), cited *Vigil* with approval, though the court's conclusion that the plaintiff's filing in that case was timely would have been the same under the construction of § 706 adopted in the *Moore* case.

The approach of the Eighth Circuit, see *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (1975), also conflicts with the decision of the Second Circuit in this case, but in a way that substantially differs from that of the Seventh Circuit decision in *Moore*. *Olson* held that in order to preserve his rights under Title VII, a complainant must under all circumstances initially file his charge with either a state fair employment practices agency or the EEOC within 180 days of the discriminatory occurrence. See also *Geromette* v. *General Motors Corp.*, 609 F. 2d 1200 (CA6 1979) (citing *Olson* with approval, thus perhaps signalling a retreat from *Anderson*'s endorsement of *Vigil*); *Rodriguez* v. *Southern Pacific Transp. Co.*, 587 F. 2d 980 (CA9 1978). Cf. *Ciccone* v. *Textron Inc.*, 616 F. 2d 1216 (CA1 1980) (substantially same approach under similar provisions in the Age Discrimination in Employment Act, 29 U. S. C. §§ 621–634).

As indicated in n. 19, *infra*, we believe that the restrictive approach exemplified by *Olson*, is not supported by the statute. Under the *Moore* decision, which we adopt today, a complainant in a deferral State having a fair employment practices agency over one year old need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. If a complainant files later than that (but not more than 300 days after the practice complained of), his right to seek relief under Title VII will nonetheless be preserved if the State happens to complete its consideration of the charge prior to the end of the 300-day period. In a State with a fair employment practices agency less than one year old, however, a complainant must file within 180 days in order to be sure that his federal rights will be preserved, since the EEOC must defer consideration during

we granted certiorari. 444 U. S. 990.[17] We now reverse.

We first review the plain meaning of the relevant statutory language; we next examine the legislative history of the 1964 Act and the 1972 amendments for evidence that Congress intended the statute to have a different meaning; and finally we consider the policy arguments in favor of a less literal reading of the Act.

I

Section 706 (e) begins with the general rule that a "charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ."[18] Since respondent's letter was submitted to the EEOC 291 days after the occurrence, he plainly did not exercise the diligence required by that general rule. Nor, as we shall explain, did he have to; but it should be pointed out that had he sent his charge to either the state agency or the EEOC within 180 days, he would have had no difficulty in complying with the terms of the exception to that general rule allowing a later filing with the EEOC in deferral States.

That exception allows a filing with the EEOC after 180 days if "the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant

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proceedings before such a new agency for up to 120 days. See 42 U. S. C. § 2000e–5 (c), n. 1, *supra*.

[17] The District Court refused to consider respondent's allegations that discrimination in the form of blacklisting had continued beyond the date of his discharge, since in its view that allegation was not fairly comprised by respondent's June 15, 1976, letter to the EEOC. The Court of Appeals unanimously reversed on that point, and remanded the case to the District Court. Petitioner sought review of that ruling in this Court, but we limited our grant of certiorari to the timeliness question discussed in today's opinion. For purposes of decision, we assume that the discrimination complained of ended with respondent's discharge on August 29, 1975.

[18] Section 706 (e) is quoted in full in n. 2, *supra*.

or seek relief from such practice . . . ." [19] When respondent submitted his letter to the EEOC, he had not yet instituted any state proceedings. Under the literal terms of the statute, it could therefore be argued that he did not bring himself within the exception to the general 180-day requirement. But in *Love* v. *Pullman Co.*, 404 U. S. 522, 525, we held that "[n]othing in the Act suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself . . . ." Here, state proceedings were instituted by the EEOC when it immediately forwarded his letter to the state agency on June 15, 1976. Accordingly, we treat the state proceedings as having been instituted on that date. Since the EEOC could not proceed until either state proceedings had ended or 60 days had passed, the proceedings were "initially instituted with a State . . . agency" prior to their official institution with the

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[19] This language has been construed to require that the filing with the state agency be made within 180 days. *Olson* v. *Rembrandt Printing Co.*, see n. 16, *supra*. Although that construction is consistent with the general rule announced at the beginning of § 706 (e), and is supported by one Congressman's understanding of the procedures at the time of the 1972 amendment to that section, see 1972 Leg. Hist. 1863 (remarks of Rep. Dent), Congress included no express requirement that state proceedings be initiated by any specific date in the portion of the subsection that relates to time limitations in deferral States. Further, there are contemporaneous indications in the legislative history, which, while not authoritative, contradict Representative Dent's views. See nn. 41–43, *infra*. See also *Doski* v. *M. Goldseker Co.*, 539 F. 2d 1326, 1330–1332 (CA4 1976) (rejecting both *Olson* and its reliance on the analysis of Rep. Dent).

In any event, we do not believe that a court should read in a time limitation provision that Congress has not seen fit to include, see *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, at least when dealing with "a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Love* v. *Pullman Co.*, 404 U. S. 522, 527. In contrast to the construction of the statute we adopt today, the *Olson* approach, urged upon us by petitioner and *amici*, is not compelled by the plain meaning of the statutory language.

EEOC. Therefore, respondent came within § 706 (e)'s exception allowing a federal filing more than 180 days after the occurrence.

That exception states that "such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . . ." Since the state proceedings did not terminate until well after the expiration of the 300-day period, see n. 5, *supra*, the 300-day limitations period is the one applicable to respondent's charge. The question, then, is whether the June 15, 1976, letter was "filed" when received by the EEOC within the meaning of subsection (e) of § 706.

The answer is supplied by subsection (c), which imposes a special requirement for cases arising in deferral States: "no charge may be filed under subsection [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . ." Thus, in terms, the statute prohibited the EEOC from allowing the charge to be filed on the date the letter was received. Although, as the Court held in *Love* v. *Pullman Co.*, *supra*, it was proper for the EEOC to hold respondent's "complaint in 'suspended animation,' *automatically filing it upon termination of the State proceedings*," [20] 404 U. S., at 526 (emphasis added), that means that the charge was filed on the 351st day, not the 291st. By that time, however, the 300-day period had run and the filing was therefore untimely.

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[20] The Court further noted that "[i]t is clear that Congress found nothing wrong, in this circumstance, with EEOC's holding the charge in abeyance until a state agency is given a chance to act." 404 U. S., at 526, n. 6.

II

In contrast to this rather straightforward reading of the statute, respondent urges us to give the word "filed" two different meanings within the same statutory section in order better to effectuate Congress' purpose underlying Title VII. Essentially, his argument is that a rule permitting filings for up to 300 days after the discriminatory occurrence—regardless of the rule against filing during the deferral period—would help further the cause of eliminating discriminatory employment practices. We therefore turn to the legislative history, but in doing so we emphasize that the words of the statute are not ambiguous. Nor does a literal reading of them lead to "absurd or futile results," *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543. For time limitations are inevitably arbitrary to some extent; and the limitations at issue here are not so short [21] that a plaintiff's remedy is effectively denied for all practical purposes without an opportunity for a hearing.[22]

A

It is unquestionably true that the 1964 statute was enacted to implement the congressional policy against discriminatory employment practices,[23] and that that basic policy must inform construction of this remedial legislation. It must also be recognized, however, in light of the tempestuous legislative proceedings that produced the Act, that the ultimate product reflects other, perhaps countervailing, purposes that some Members of Congress sought to achieve. The present lan-

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[21] Compare the 6-month limitations provision for filing complaints with the National Labor Relations Board under the Labor Management Relations Act, 29 U. S. C. § 160 (b).

[22] We are not confronted with a case in which it is claimed that the plaintiff was reasonably unaware of the existence of his cause of action until after the expiration of the limitations period. Cf. *United States* v. *Kubrick*, 444 U. S. 111 (medical malpractice action).

[23] See, *e. g.*, S. Rep. No. 867, 88th Cong., 2d Sess., 1 (1964) (hereinafter 1964 Senate Report).

guage was clearly the result of a compromise. It is our task to give effect to the statute as enacted. See *Toussie* v. *United States*, 397 U. S. 112, 123–124.[24]

The typical time limitations provision in the numerous proposed civil rights bills required the filing of a charge with the new federal fair employment practices agency within six months of the discriminatory conduct.[25] These initial proposals did not provide for mandatory deferral by the federal agency during comparable state administrative proceedings,[26] though some proposals would have authorized the federal agency to enter agreements of cooperation with state agencies, under which the federal agency would refrain from processing charges in specified cases.[27]

On February 10, 1964, the House of Representatives passed H. R. 7152, its version of the comprehensive Civil Rights Act. Title VII of that bill contained a 6-month limitations provision for the filing of charges with the EEOC, and directed the EEOC to enter into agreements with state agencies providing for suspension of federal enforcement.[28] In the Senate, H. R. 7152 met with exceptionally strong opposition. The principal opposition focused not on the details of the bill, but on its fundamental purpose. During the course of one of the longest filibusters in the history of the Senate, the bipartisan leadership of the Senate carefully forged the compromise substitute

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[24] See also *Hodgson* v. *Lodge 851, Int'l Assn. of Machinists & Aerospace Workers*, 454 F. 2d 545, 562 (CA7 1971) (Stevens, J., dissenting).

[25] See, *e. g*, Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States before Subcommittee No. 5 of the House Judiciary Committee, 88th Cong., 1st Sess., 97, 188, 899, 2294 (1963) (hereinafter 1963 House Judiciary Committee Hearings). Others contained 1-year provisions, see *id.*, at 10, 50, and at one point the Senate Committee on Labor and Public Welfare Committee recommended a bill with a 2-year provision. See 1964 Senate Report, at 13.

[26] See, *e. g.*, 1963 House Judiciary Committee Hearings, at 9–10, 50.

[27] *Id.*, at 2296; 1964 Senate Report, at 16.

[28] See 110 Cong. Rec. 2511–2512, 12598 (1964).

(Dirksen compromise) that was ultimately to become in substantial part the Civil Rights Act of 1964. The purpose of the compromise was to attract sufficient support to achieve the two-thirds vote necessary for cloture.[29] This effort was successful. Fifteen days after the Dirksen compromise was offered as an amendment, a cloture motion carried the necessary votes.[30]

Section 706 (d) [31] of the compromise provided for a 90-day limitations period for filing discrimination claims with the EEOC in nondeferral States, the period ultimately adopted in the 1964 version of the Act. It was the first time the 90-day figure appeared in any proposed bill, and its appearance was unaccompanied by any explanation. Section 706 (b) of the compromise introduced the mandatory deferral concept for the first time, providing that during a 60-day deferral period, "no charge may be filed"—language that figures so prominently in this case. In such deferral States, § 706 (d) extended the time for filing with the EEOC to 210 days.

Since the Senate did not explain why it adopted a time limitation of only half that adopted by the House, one can only speculate. But it seems clear that the 90-day provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination. To others it must have represented a necessary sacrifice of the rights of some victims of discrimination in order that a civil rights bill could be enacted. Section 706 (b) was rather clearly intended to increase the role of States and localities in resolving charges

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[29] *Id.*, at 12593–12594 (remarks of Sen. Clark).

[30] See *id.*, at 11926, 13327.

[31] The 1972 amendment added a new subsection (a) to § 706. Subsections (b) and (d) in the 1964 version with certain changes thus became the current subsections (c) and (e) in the amended 1972 version.

of employment discrimination.[32] And § 706 (d)'s longer time of 210 days for filing with the EEOC in deferral States was included to prevent forfeiture of a complainant's federal rights while participating in state proceedings.[33]

But neither this latter provision nor anything else in the legislative history contains any "suggestion that complainants in some States were to be allowed to proceed with less diligence than those in other states." *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811, 825, n. 35 (CA7 1972). The history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated.[34] The statutory plan was not designed to give the worker in a deferral State the option of choosing between his state remedy and his federal remedy, nor indeed simply to allow him additional time in which to obtain state relief. Had that been the plan, a simple statute prescribing a 90-day period in nondeferral States and a 210-day period in deferral States would have served the legislative purpose. Instead, Congress chose to prohibit the filing of any federal charge until after state proceedings had been completed or until 60 days had passed, whichever came sooner.

To be sure, in deferral States having fair employment practices agencies over one year old, Congress in effect gave com-

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[32] See 110 Cong. Rec. 11937 (1964) (remarks of Sen. Humphrey); *id.*, at 8193, 13087 (remarks of Sen. Dirksen): "[W]ith respect to the enforcement of the title, we undertook to keep primary, exclusive jurisdiction in the hands of the State commissions for a sufficient period of time to let them work out their own problems at the local level."

[33] See *id.*, at 12819.

[34] At the time, it was believed that 60 days was more than sufficient time for state administrative resolution of employment discrimination complaints. See *id.*, at 13087 (remarks of Sen. Dirksen): "In the case of California, FEPC [Fair Employment Practice Commission] cases are disposed of in an average of about 5 days. In my own State [Illinois] it is approximately 14 days."

plainants an additional 60 days in which initially to file a charge and still ensure preservation of their federal rights. In other words, under the 1964 Act, a complainant in such a deferral State could have filed on the 150th day, and then filed with the EEOC on the 210th day at the end of the 60-day deferral period, while a complainant in a nondeferral State had to file on the 90th day with the EEOC. But there is no reason to believe that the 1964 Congress intended deferral state complainants to have the additional advantage of being able to ignore the 210-day limitations period when they failed to invoke their rights early enough to allow the 60-day deferral period to expire within the 210-day period.

In sum, the legislative history of the 1964 statute is entirely consistent with the wording of the statute itself.

B

In 1972, Congress amended § 706 by changing the general limitations period from 90 days to 180 days and correspondingly extended the maximum period for deferral States from 210 days to 300 days.[35] The amendment did not make any change in the procedural scheme, however, although such a change was proposed and rejected.

As initially introduced in the House of Representatives, the proposed 1972 amendments to Title VII would have deleted § 706 (b)'s prohibition against the filing of a federal charge until 60 days after the institution of state proceedings, and would have substituted language merely prohibiting the EEOC from taking any action on the charge until the prescribed period had elapsed.[36] The House, however, concluded that no change in this aspect of the 1964 statute should be made, and deleted the amendment prior to passage.[37] The Senate version of the amendments passed with

[35] 86 Stat. 104–105.

[36] H. R. 1746, 92d Cong., 1st Sess. (Jan. 22, 1972), 1972 Leg. Hist. 4.

[37] H. R. 1746, *supra*, 1972 Leg. Hist. 326.

the provision merely prohibiting the EEOC from taking any action on a charge in the deferral period.[38] But at conference, the position of the House prevailed on the understanding that the law as interpreted in *Love* v. *Pullman Co.*, 404 U. S. 522, was controlling.[39] As already noted, our literal reading of the word "filed" in § 706 is fully supported by the *Love* opinion.[40]

It is true that a section-by-section analysis of the 1972 amendments filed by Senator Williams refers to the then recent decision of the Tenth Circuit in *Vigil* v. *American Tel. & Tel. Co.*, 455 F. 2d 1222 (1972), see n. 16, *supra*, with approval, and that that case supports respondent's reading of the Act. But we do not find that isolated reference—which was first inserted into the legislative history after the completion of the work of both the Senate Committee and House Committee, as well as after the Report of the joint conference just referred to[41]—to represent either a sound interpretation of the 1964 enactment[42] or a conscious intention of Congress to

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[38] S. 2515, 92d Cong., 2d Sess. (Feb. 21, 1971), 1972 Leg. Hist. 1781.

[39] S. Rep. No. 92–681, p. 17 (1972), 1972 Leg. Hist. 1815:

"The Senate amendment contained two provisions allowing the Commission to defer to state and local equal employment opportunity agencies. It deleted the language of existing law providing that no charge may be filed during the 60-day period allowed for the deferral and substituted a provision prohibiting the Commission from acting on such a charge until the expiration of the 60-day period. *The House bill made no change in existing law.* The Senate receded with an amendment that would restate the existing law on the deferral of charges to state agencies. The conferees left existing law intact with the understanding that the decision in *Love* v. *Pullman* [*Co.*, 404] U. S. [522 (1972)] interpreting the existing law to allow the Commission to receive a charge (but not act on it) during such deferral period is controlling." (Emphasis added.)

[40] See n. 20, *supra*.

[41] The section-by-section analysis is dated March 6, 1972. The Conference Report quoted in n. 39, *supra*, is dated March 2, 1972.

[42] In *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 758, we rejected a similar argument: "Respondent argues finally that a Committee Report

change existing law. The point at which it appears in the legislative history simply refutes any notion that Congress focused on the precise issue, much less adopted the approach of the *Vigil* case.[43] To the extent that Congress focused on the issue at all in 1972, it expressly rejected the language that would have mandated the exact result that respondent urges.

III

Finally we consider the additional points advanced in support of respondent's position: (1) that it is unfair to victims of discrimination who often proceed without the assistance of counsel; (2) that it is contrary to the interpretation of the Act by the agency charged with responsibility for its enforce-

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that accompanied 1978 ADEA amendments[, which made no change in the language at issue in the case,] supports his construction of § 14 (b). This Committee Report suggested that resort to state remedies should be optional under § 14 (b). See S. Rep. No. 95–493, pp. 6–7 (1978), adopted in Joint Explanatory Statement of the Committee of Conference, H. R. Conf. Rep. No. 95–950, pp. 7, 12 (1978).

"We are not persuaded. The Senate Report No. 95–493 was written 11 years after the ADEA was passed in 1967, and such '[l]egislative observations . . . are in no sense part of the legislative history.' *United Airlines, Inc.* v. *McMann*, 434 U. S. 192, 200 n. 7 (1977). 'It is the intent of the Congress that enacted [the section] . . . that controls.' *Teamsters* v. *United States*, 431 U. S. 324, 354 n. 39 (1977). Whatever evidence is provided by the 1978 Committee Report of the intent of Congress in 1967, it is plainly insufficient to overcome the clear and convincing evidence that Congress intended § 14 (b) to have the same meaning as § 706 (c). We therefore hold that under § 14 (b) of the ADEA, as under § 706 (c) of Title VII, resort to administrative remedies in deferral States by individual claimants is mandatory, not optional." (Footnotes omitted.)

See also *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, *ante*, at 116–120.

[43] Indeed as we pointed out in n. 19, *supra*, Congressman Dent had an entirely different understanding of the limitations period that Congress adopted. Representative Dent's remarks are dated March 8, 1972.

ment; and (3) that a less literal reading of the Act would adequately effectuate the policy of deferring to state agencies.

The unfairness argument is based on the assumption that a lay person reading the statute would assume that he had 300 days in which to file his first complaint with either a state or federal agency. We find no merit in this argument. We believe that a lay person would be more apt to regard the general obligation of filing within 180 days as the standard of diligence he must satisfy, and that one who carefully read the entire section would understand it to mean exactly what it says.

We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its "interpretation" of the statute cannot supersede the language chosen by Congress.[44]

Finally, we reject the argument that the timeliness requirements would be adequately served by allowing the EEOC to treat a letter received on the 291st day as "filed" and interpreting the § 706 (c) prohibition as merely requiring it to postpone any action on the charge for at least 60 days. There are two reasons why this interpretation is unacceptable.

By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.[45] Under a literal reading of the Act, the EEOC has a duty to commence its investigation no later than 300 days after the alleged occurrence; under respondent's "interpretation" of § 706 (c), that duty might not arise for 360 days. Perhaps the addition of another 60-day delay in the work of an already seriously overburdened agency is not a matter of critical importance. But in a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days—rather

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[44] See *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 140–142.

[45] S. Rep. No. 92–415, p. 24 (1971), 1972 Leg. Hist. 433.

than months or years—we may not simply interject an additional 60-day period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

In the end, we cannot accept respondent's position without unreasonably giving the word "filed" two different meanings in the same section of the statute. Even if the interests of justice might be served in this particular case by a bifurcated construction of that word, in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Accordingly, the judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

This might be viewed as "one of those cases that occasionally appears in the procedural area where it is more important that it be decided (in order to dispel existing conflict . . .) than that it be decided correctly." *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 766 (1979) (concurring opinion). But I cannot concur in the result the Court reaches today. For reasons set out below, I believe that the Court's decision neither is correct as a matter of statutory construction, nor does it dispel the existing decisional conflict, see *ante*, at 814–815, n. 16, in an acceptable fashion. I would affirm the holding of the Court of Appeals that, in a deferral State, a Title VII complaint is timely filed with the EEOC if it is "filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred." § 706 (e), 42 U. S. C. § 2000e–5 (e).

I

The Court finds its interpretation of the interplay between §§ 706 (c) and (e) of Title VII, 42 U. S. C. §§ 2000e–5 (c) and (e), to be based upon a "rather straightforward reading of the statute." *Ante*, at 818. That finding is cast into some doubt when one carefully considers the language, structure, and purpose of § 706. Moreover, the relevant legislative history leaves no room whatsoever for doubt that the Court's perception of Congress' intent is erroneous.

The rule the Court adopts today requires a Title VII complainant residing in a deferral State to file a charge of employment discrimination within 240 days of the allegedly unlawful act, in order to be certain that his complaint is timely. Yet the numeral "240" nowhere appears in Title VII. It seems a bit odd that Congress, in enacting "a statutory scheme in which laymen, unassisted by trained lawyers initiate the process," *Love* v. *Pullman Co.*, 404 U. S. 522, 527 (1972); see *ante*, at 816, n. 19, would create a filing rule that a complainant could not locate by reading any single statutory provision. One commentator has observed:

> "A case of employment discrimination may require a party to refer to the United States Code for the first and only time in his life. An intelligent, but isolated reading of section 706 (e) could easily lead one to believe that 300 days is the time limitation for filing an initial claim with the EEOC. A complainant should not be penalized for Congressional ambiguity, or because he does not possess the reading ability of one trained in statutory interpretation. This indeed is the level of skill required to find the 'hidden' 240-day limitation advocated by the district court in *Silver*." Comment, 55 Notre Dame Law. 396, 410 (1980).

Of course, as was stated just the other day, "[o]ur compass is not to read a statute to reach what we perceive . . . is a 'sensible result.'" *Bifulco* v. *United States*, *ante*, at 401

(concurring opinion); yet, where alternative meanings of Congress' words are plausible, we should not close our eyes to those alternatives through a strong-armed invocation of the plain-meaning rule. I believe that an alternative to the Court's interpretation of the interplay between §§ 706 (c) and (e) does exist, and that Congress intended to adopt that alternative.

The Court of Appeals in this case viewed § 706 (e), standing alone, as stating the filing requirements for one who wishes to institute a charge of employment discrimination with the EEOC. It concluded that "the requirement in § 706 (c) that no charge be 'filed' before the deferral period ends simply means that the EEOC may not *process* a Title VII complaint until sixty days after it has been referred to a state agency." 602 F. 2d 1083, 1088 (1979) (emphasis supplied). The dual meaning that the Court of Appeals gave to the word "filed" might seem strained at first blush, but that court's interpretation is supported by the structure of Title VII. Reading the word "filed" to mean two different things in the two subsections avoids an interpretation of the statute that requires a lay person to determine the time requirements for filing a complaint through reference to two separate provisions. Moreover, the Court of Appeals' interpretation of the meaning of the word "filed" in § 706 (c) in no way detracts from Congress' purpose in enacting that subsection—to prevent the EEOC from taking action on a discrimination complaint until the relevant state agencies have had an opportunity to resolve the employee's dispute with his employer. See *ante*, at 821. Given these considerations, I am not willing to reject the Court of Appeals' interpretation of the statute out of hand.

Furthermore, examination of Title VII's legislative history leads me to conclude that Congress, in 1972, adopted the interpretation of the statute that the Court of Appeals was later to espouse. In examining this legislative history, it is important to note that the EEOC, the agency charged by

Congress with administering Title VII, has always treated as timely a charge filed within the 300-day period specified in § 706 (e), without regard to the 60-day deferral period specified in § 706 (c). See 29 CFR § 1601.12 (b)(1)(v)(A) (1977); 29 CFR § 1601.13 (a) (1979). Aside from the fact that the EEOC's consistent interpretation of the filing requirements is " 'entitled to great deference,' " *Oscar Mayer & Co.* v. *Evans*, 441 U. S., at 761, quoting from *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434 (1971), that interpretation was approved by Congress expressly when it re-enacted the forerunners to the present §§ 706 (c) and (e) in 1972. Under such circumstances, this Court is bound to accept the agency's interpretation.[1]

In 1971, the pertinent House and Senate Committees both reported bills to amend Title VII that would have deleted the "no charge shall be filed" language from § 706 (c), and substituted in its place a provision that "the Commission shall take no action with respect to the investigation of such charge" until the deferral period had expired. See S. Rep. No. 92–415, p. 56 (1971); H. R. Rep. No. 92–238, p. 43 (1971).[2] Had either of these bills been enacted, the Court

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[1] It seems significant that the Court today "adopts," *ante*, at 814, n. 16, the decision in *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811 (CA7 1972), the initial opinion in which was filed *prior to* the passage of the 1972 re-enactment of §§ 706 (c) and (e). See *id.*, at 830 (order on petition for rehearing). In *Moore*, the Seventh Circuit stated that the legislative history of the 1972 re-enactment was not relevant to a proper interpretation of Title VII's filing requirements, as they were enacted in 1964. *Ibid.* Today, this Court goes a step further in failing to give that legislative history appropriate weight in interpreting the 1972 re-enactment.

[2] The Senate Committee on Labor and Welfare explained the need for an amendment to the forerunner of § 706 (c) in the following terms:

"The only change in the present law is to delete the phrase 'no charge may be filed' with the Commission by an aggrieved person in [a deferral] State or locality. The present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State or local agency. The new language clarifies the present statute by permitting the

of Appeals' interpretation of Title VII's filing requirements could not be questioned. The proposed amendments to § 706 (c) generated no controversy during the debates in either House. For reasons completely unrelated to the question presented here, however, the House of Representatives adopted a substitute bill that made no change in the language of § 706 (c). See Legislative History of the Equal Employment Opportunity Act of 1972 (Committee Print compiled for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor), pp. 326–332 (1972).[3] The Senate, on the other hand, retained the Committee on Labor and Public Welfare's amendment to the forerunner of § 706 (c). See 118 Cong. Rec. 4945 (1972); Legislative History, p. 1781.

The Conference Committee did not adopt the Senate bill's version of § 706 (c), but its explanation for failing to do so is clear and is critical to an understanding of the effect of the 1972 amendments on the question presented here. The Conference Committee stated:

> "The Senate amendment contained two provisions allowing the Commission to defer to state and local equal employment opportunity agencies. It deleted the language of existing law providing that no charge may be filed during the 60-day period allowed for the deferral and substituted a provision prohibiting the Commission from acting on such a charge until the expiration of the 60-day period. The House bill made no change in existing law. The Senate receded with an amendment that

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charge to be filed but prohibiting the Commission from taking action with respect thereto until the prescribed period has elapsed." S. Rep. No. 92–415, p. 36 (1971).

[3] There is absolutely no support in the reports of the House debates for the Court's implication, *ante*, at 822–823, that the House expressly considered the desirability of effecting a change in the forerunner to § 706 (c) and purposefully rejected the amendment that had been proposed by its Committee on Education and Labor.

would re-state the existing law on the deferral of charges to state agencies. *The conferees left existing law intact with the understanding that the decision in Love* v. *Pullman* [*Co.*, 404] U. S. [522 (1972)] *interpreting the existing law to allow the Commission to receive a charge* (*but not act on it*) *during such deferral period is controlling.*" S. Conf. Rep. No. 92–681, p. 17 (1972); H. R. Conf. Rep. No. 92–899, p. 17 (1972) (emphasis supplied).

In addition, a section-by-section analysis prepared by Senators Williams and Javits, and presented to both Houses along with the Conference Report, contained the following explanation of re-enacted § 706 (c):

"No change . . . was deemed necessary in view of the recent Supreme Court decision of *Love* v. *Pullman Co.* . . . which approved the present EEOC deferral procedures as fully in compliance with the intent of the Act. That case held that the EEOC may receive and defer a charge to a State agency on behalf of a complainant and begin to process the charge in the EEOC upon lapse of the 60-day deferral period, even though the language provides that no charge can be filed under § 706 (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. *Similarly, the recent circuit court decision in Vigil* v. *AT&T*, [455] F. 2d [1222] . . . (10th Cir. 1972), *which provided that in order to protect the aggrieved person's right to file with the EEOC within the time periods specified in sections 706* (c) *and* (d), *a charge filed with a State or local agency may also be filed with the EEOC during the 60-day deferral period, is within the intent of this Act.*" 118 Cong. Rec. 7167 (1972) (Senate); *id.*, at 7564 (House) (emphasis supplied).[4]

[4] The Court fails to credit the Williams-Javits section-by-section analysis as an authoritative interpretation of the 1972 re-enactment of § 706,

In the face of these indicia of Congress' intent, the Court states blithely that "our literal reading of the word 'filed' in § 706 is fully supported by the *Love* opinion." *Ante*, at 823. But even setting aside its questionable dismissal of the Williams-Javits section-by-section analysis, see n. 4, *supra*, the Court here obviously errs in interpreting the Conference Report itself. The relevant inquiry is not what this Court actually held in *Love*, as the Court seems to think, but what the Conference Committee, writing some six weeks after *Love*, thought that the Court held. The passage, quoted above, from the Conference Report makes it clear that the conferees believed the import of the *Love* decision was that the proposed Senate amendment to § 706 (c) was totally unnecessary. Congress thus believed this Court to have held that existing law permitted the EEOC to treat as timely those charges filed in a deferral State within 300 days, without regard to the "no charge may be filed" language of § 706 (c), and intended that that interpretation should continue to be considered "controlling."

The Court concludes that Congress in 1972 "expressly rejected the language that would have mandated the exact

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primarily because it fails to recognize the Conference Committee's intent that the re-enacted section be interpreted differently from the Court's perception of what would constitute "a sound interpretation of the 1964 enactment." *Ante*, at 823. It is the legislative history of the 1972 amendments that is of primary relevance here, and the compilation of that history prepared by the Subcommittee on Labor for use of the Senate Committee on Labor and Public Welfare (cited throughout the Court's opinion), endorses the Williams-Javits section-by-section analysis as "a more detailed explanation of all the provisions of the bill as viewed by the sponsors and legislative leaders." Legislative History of the Equal Employment Opportunity Act of 1972 (Committee Print compiled for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor), p. xv, n. 3 (1972). The analysis of re-enacted § 706 presented to the House by Representative Dent, discussed by the Court, *ante*, at 816, n. 19, on the other hand, does not purport to speak for the views of the sponsors and managers of the 1972 amendments. See 118 Cong. Rec. 7569 (1972).

result that respondent urges." *Ante,* at 824. But a fair analysis of the legislative history demonstrates that Congress re-enacted §§ 706 (c) and (e) with an expectation that those provisions, as re-enacted, would be interpreted to mandate the result that had long been accepted by the EEOC. The Court's decision today not only ignores Congress' avowed intent but it also is inconsistent with our past opinions recognizing that "[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States* v. *Sheffield Board of Comm'rs,* 435 U. S. 110, 134 (1978); *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 414, n. 8 (1975) (construing 1972 amendments to Title VII).

II

Despite the Court's failure to give effect to the obvious intent of Congress in enacting the 1972 amendments, one might be tempted to go along with the rule it creates today if that rule had at least the advantage of creating a fixed and settled procedure for the filing of a Title VII complaint. But measured by the standard of practicality and ease of administration, I find the Court's rule sadly wanting.

Contemplate for a moment the plight of the local EEOC officer charged with responsibility for explaining the Court's rule to a prospective Title VII complainant in one of the Nation's 42 deferral States.[5] The prospective complainant informs the officer that he was fired from his job nine months ago, and now has reason to believe that his discharge was motivated by racial discrimination. He wants to know whether he still may file a timely charge with the EEOC. Under the Court's rule, the EEOC officer will not be able to

[5] The EEOC in its current regulations, 29 CFR § 1601.74 (a) (1979), lists 42 statewide deferral agencies, in addition to deferral agencies for the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and a substantial number of municipalities and counties.

answer the concerned employee with anything more than an equivocal "maybe." He must reply (paraphrasing the words of the Court, *ante*, at 822): "It depends on whether you invoke your rights early enough to allow the 60-day deferral period to expire within 300 days." In other words, if the hypothetical complainant files his charge 270 days after his discharge, and the EEOC refers the charge to the relevant state agency immediately, and that agency terminates its proceedings within 30 days, the federal charge will have been timely filed. But if the state agency does not terminate its proceedings for a year (perhaps due to backlog or, ironically, because the complaint has merit), then the EEOC cannot consider the charge to have been filed until 330 days have elapsed, and the complainant will be unable to invoke his federally protected rights.

The foregoing example demonstrates that the rule the Court adopts today serves only to add more complexity to the already complex procedural provisions of Title VII. To be sure, an employee will be able to guarantee timely filing by bringing a complaint to the attention of the EEOC within 240 days (a time limitation that *nowhere* appears in the text of the statute), but if that employee files his charge between day 240 and day 300, he must await further developments.[6] This "wait and see" rule seems out of place in the context of a federal statute designed to vindicate workers' rights to be free from invidious discrimination in the workplace. Moreover, the Court's rule will no doubt result in future complications that the courts or Congress will have to disentangle.

One wonders whether the Court has anticipated the prob-

[6] The Court asserts that the prospective complainant will not be prejudiced unfairly by the adoption of its "240-day maybe" rule because "a lay person would be more apt to regard the general obligation of filing within 180 days as the standard of diligence he must satisfy." *Ante*, at 825. The Court's conclusion that the plain meaning of § 706 (e), standing alone, is that a charge must be filed within 180 days in a deferral State is myopic, at best.

lems that may arise from the indeterminancy of the "240-day maybe" rule it announces. Will complainants in deferral States be permitted to seek artifically speedy terminations of state proceedings in order to preserve their federal rights? Will employers be permitted to oppose such early terminations of state proceedings? Will state and local agencies be permitted to adopt a practice of terminating proceedings immediately whenever a complainant referred to them by the EEOC needs prompt action in order to preserve his federal remedies? These unanswered questions lead me to conclude that the Court's "rather straightforward reading" of § 706 may indeed lead to "absurd or futile results," despite the Court's conclusion to the contrary. *Ante*, at 818. The possible problems that I pose, of course, would cause me less concern were it clear that they result from the scheme that Congress intended to enact. But for the reasons stated in Part I, *supra*, I believe that Congress clearly did not intend to enact the Court's "240-day maybe" rule for judging the timeliness of a charge filed with the EEOC.

It remains for Congress to restrike "the balance," *ante*, at 826, it plainly intended to set when it re-enacted §§ 706 (c) and (e) in 1972. I dissent from the Court's adoption of a rule that both alters that balance and, at the same time, serves no useful end.

Reporter's Note

The next page is purposely numbered 901. The numbers between 835 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 9 THROUGH JUNE 23, 1980

JUNE 9, 1980

Appeals Dismissed

No. 79–1597. KEYHEA *v.* ENOMOTO, CORRECTIONS DIRECTOR, ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–6443. PROFIT *v.* CITY OF NIAGARA FALLS, NEW YORK, ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 610 F. 2d 807.

No. 79–6496. PETREA *v.* PETREA. Appeal from Sup. Ct. Del. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 414 A. 2d 820.

Vacated and Remanded on Appeal

No. 79–185. CONSUMERS UNION OF UNITED STATES, INC., ET AL. *v.* VIRGINIA STATE BAR ET AL. Appeal from D. C. E. D. Va. Judgment vacated and case remanded for further consideration in light of *Supreme Court of Va.* v. *Consumers Union of United States, Inc.*, 446 U. S. 719 (1980). MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 470 F. Supp. 1055.

Certiorari Granted—Vacated and Remanded

No. 79–5518. MCSHAN *v.* GEORGIA. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and

certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Mendenhall*, 446 U. S. 544 (1980). Reported below: 150 Ga. App. 232, 257 S. E. 2d 202.

Miscellaneous Orders

No. A–953. NOE *v.* UNITED STATES. Application for bail, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–981. BUZZANCA *v.* UNITED STATES. Application for bail, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–1013. WALNUT PROPERTIES, INC. *v.* LONG BEACH CITY COUNCIL. Application to stay execution of the decision of the Long Beach City Council, dated March 9, 1978, addressed to MR. JUSTICE STEWART and referred to the Court, denied.

No. D–194. IN RE DISBARMENT OF AMOS. It is ordered that Howard W. Amos, of Worthington, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motion of the United States for leave to intervene referred to the Special Master. Report of the Special Master received and ordered filed. Exceptions, if any, with supporting briefs to the Report of the Special Master may be filed by the parties within 30 days. Reply briefs, if any, to such exceptions may be filed within 30 days. [For earlier order herein, see, *e. g.*, 445 U. S. 913.]

No. 79–770. ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSN. ET AL.; and COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CONSOLIDATION COAL CO. ET AL. C. A. 4th Cir. [Certiorari granted, 444 U. S. 1069.] Motion of respondents for divided argument granted.

No. 79–816. POTOMAC ELECTRIC POWER CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, 444 U. S. 1069.] Motion of the Solicitor General for divided argument granted.

No. 79–1128. MONTANA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 445 U. S. 960.] Motion of respondents for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Motion of petitioners for additional time for oral argument granted, and 15 additional minutes allotted for that purpose.

No. 79–1388. KIRCHBERG *v.* FEENSTRA ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 446 U. S. 917.] Motion of Rudolph R. Schoemann, Esquire, to permit Alan F. Schoenberger, Esquire, of New Orleans, La., to present oral argument *pro hac vice* granted.

No. 79–5269. EDWARDS *v.* ARIZONA. Sup. Ct. Ariz. [Certiorari granted, 446 U. S. 950.] Motion for appointment of counsel granted, and it is ordered that Michael J. Meehan, Esquire, of Tucson, Ariz., be appointed to serve as counsel for petitioner in this case.

No. 79–6558. PAUL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA; and

No. 79–6576. RHEUARK *v.* TEXAS ET AL. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 79–404. UNITED STATES *v.* CORTEZ ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 595 F. 2d 505.

No. 79–1344. MICHAEL M. *v.* SUPERIOR COURT OF SONOMA COUNTY (CALIFORNIA, REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari granted. Reported below: 25 Cal. 3d 608, 601 P. 2d 572.

No. 79–1404. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL.;

No. 79–1408. MAYOR OF PHILADELPHIA ET AL. *v.* HALDERMAN ET AL.;

No. 79–1414. PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* PENNHURST STATE SCHOOL AND HOSPITAL ET AL.;

No. 79–1415. COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATOR FOR BUCKS COUNTY ET AL. *v.* HALDERMAN ET AL.; and

No. 79–1489. PENNHURST PARENTS-STAFF ASSN. *v.* HALDERMAN ET AL. C. A. 3d Cir. Certiorari granted except as to Question 3, presented in petitions Nos. 79–1404 and 79–1489. Counsel are also requested to brief and argue the following question: Does 42 U. S. C. § 1983 provide a private remedy to enforce the provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6000 *et seq.*? Cases consolidated and a total of two hours allotted for oral argument. Reported below: 612 F. 2d 84.

Certiorari Denied. (See also Nos. 79–1597, 79–6443, and 79–6496, *supra.*)

No. 79–1062. MARKHAM *v.* PITCHESS, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 436.

No. 79–1314. 1776 K STREET ASSOCIATES ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 221 Ct. Cl. 256, 602 F. 2d 354.

No. 79–1342. KLEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1292.

No. 79–1400. TOUGHILL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 449.

No. 79–1427. PETERSEN ET AL. *v.* UNITED STATES;
No. 79–1443. MITCHELL ET AL. *v.* UNITED STATES;
No. 79–6071. CARLSON *v.* UNITED STATES;
No. 79–6234. DIXON *v.* UNITED STATES;
No. 79–6245. LEONHARDT *v.* UNITED STATES;
No. 79–6254. IGO *v.* UNITED STATES; and
No. 79–6301. MILLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 1313.

No. 79–1498. VEN-FUEL, INC. *v.* DUNCAN, SECRETARY OF ENERGY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–1499. WEINTRAUB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 613 F. 2d 612.

No. 79–1519. LEVEY ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 616 F. 2d 668.

No. 79–1539. METRO TRUCK BODY, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 746.

No. 79–1540. SADLOWSKI ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 79–1598. M. J. KELLEY CO. *v.* WOODS, COMMISSIONER OF REVENUE OF TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 592 S. W. 2d 567.

No. 79–1613. HUFFNAGLE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79–1616. ANGLIN *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 79–1622. PREVETTE ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 43 N. C. App. 450, 259 S. E. 2d 595.

No. 79–1624. LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL–CIO *v.* DONN PRODUCTS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 613 F. 2d 162.

No. 79–1626. LAS VEGAS SUN, INC. *v.* SUMMA CORP., DBA CASTAWAYS CASINO, FRONTIER HOTEL, AND DESERT INN HOTEL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 614.

No. 79–1639. BEVERLY BANK ET AL. *v.* ILLINOIS SAVINGS & LOAN ASSN. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 1101, 399 N. E. 2d 1388.

No. 79–1644. CANFIELD ET UX. *v.* NEW YORK CITY; and
No. 79–1668. BADGLEY ET AL. *v.* NEW YORK CITY. C. A. 2d Cir. Certiorari denied. Reported below: 606 F. 2d 358.

No. 79–1650. SUPREME EQUIPMENT & SYSTEMS CORP. *v.* WALTER M. BALLARD CO. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 59, 610 F. 2d 1001.

No. 79–1657. BOWE *v.* FIRST OF DENVER MORTGAGE INVESTORS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 2d 798.

No. 79–1662. BLACKBURN ET AL., DBA TINY BLACKBURN AGENCY *v.* CRUM & FORSTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 102.

No. 79–1669. FIRST BANK OF OAK PARK *v.* UNITED CALIFORNIA BANK. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 98 Cal. App. 3d 439, 159 Cal. Rptr. 607.

No. 79–1674. KONDRAT *v.* MITROVICH ET AL. Ct. App. Ohio, Lake County. Certiorari denied.

No. 79–1693. TERRY TUCK, INC. *v.* CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 465.

No. 79–1694. HAMILTON *v.* GENERAL MOTORS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 576.

No. 79–1700. BRUMMITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 62.

No. 79–1757. ARTARIAN *v.* ARTAR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 809.

No. 79–1766. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 384.

No. 79–1784. BELLA ET AL., DBA DAVE STREIFFER CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 1272.

No. 79–1814. DOWNS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 677.

No. 79–5873. VASQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 1338.

No. 79–6077. COBB *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 754.

No. 79–6143. GRISTEAU *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 611 F. 2d 181.

No. 79–6211. FARIAS-CONTRERAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 561.

No. 79–6224. GRECO *v.* WORKMAN, PRE-RELEASE CENTER SUPERINTENDENT. C. A. 1st Cir. Certiorari denied.

No. 79–6300. GINDI *v.* DUNHAM, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–6306. ANTONELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1104.

No. 79–6327. TATASCIORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 291.

No. 79–6337. COX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 413.

No. 79–6379. TROLLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79–6386. JENKINS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 974, 421 N. Y. S. 2d 751.

No. 79–6395. ALSTON *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 79–6400. PFEIFER *v.* UNITED STATES BUREAU OF PRISONS. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 873.

No. 79–6404. CROOKER *v.* U. S. DEPARTMENT OF JUSTICE. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 573.

No. 79–6429. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–6438. HARRISON *v.* GALLIA COUNTY CHILDREN'S SERVICES BOARD. Ct. App. Ohio, Gallia County. Certiorari denied.

No. 79–6439. MADDOX *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 591 S. W. 2d 898.

No. 79–6440. PITTS *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–6441. GALLIMORE *v.* GARRISON. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 98.

No. 79–6444. WILLIAMS ET AL. *v.* AIR TRANSPORT UNION LOCAL NO. 504 ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 577.

No. 79–6445. MASON *v.* WOLFE. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 812.

No. 79–6451. YOUNG *v.* SHARP, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 79–6452. HERRINGTON *v.* GRIGGS, SUPERINTENDENT, CALIFORNIA INSTITUTION FOR MEN. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 116.

No. 79–6455. WILLIAMS *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 881.

No. 79–6457. JOHNSON *v.* CARTER, PRESIDENT OF THE UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 581.

No. 79–6459. HOWELL *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 79–6462. SIMPSON *v.* MINICK, SHERIFF. C. A. 6th Cir. Certiorari denied.

No. 79–6466. EVANS *v.* CANNON ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 79–6473. HOWZE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 79–6494. GINSBURG *v.* TIGHE. Sup. Ct. N. J. Certiorari denied.

No. 79–6513. BUTLER *v.* ALEXANDER, SECRETARY OF THE ARMY, ET AL. C. A. D. C. Certiorari denied.

No. 79–6540. PROFFITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 79–6551. SMILEY *v.* CORCORAN, LOS ANGELES COUNTY CLERK, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–6581. ELORDUY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 986.

No. 79–6594. RUCKER *v.* CITY OF SAINT LOUIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 2d 1102.

No. 79–6598. MIZELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 1367.

No. 79–6599. CAMPBELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 1151.

No. 79–6602. COUCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 616 F. 2d 954.

No. 78–6884. ELMORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 595 F. 2d 1036.

No. 79–333. BOERCKEL *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 68 Ill. App. 3d 103, 385 N. E. 2d 815.

No. 79–5197. VASQUEZ-SANTIAGO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 602 F. 2d 1069.

No. 79–5926. THORSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari.

No. 79–6170. FLORES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 620 F. 2d 286.

No. 79–725. MAINE PUBLIC UTILITIES COMMISSION *v.* CENTRAL MAINE POWER CO. Sup. Jud. Ct. Me. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 405 A. 2d 153.

No. 79–1454. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* WRIGHT ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 603 F. 2d 666.

No. 79–1629. BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS ET AL. *v.* NORTHCROSS ET AL.; and

No. 79–1630. CITY OF MEMPHIS ET AL. *v.* NORTHCROSS ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 611 F. 2d 624.

No. 79–6017. NASTU *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner to strike the supplement to the petition and certiorari denied. Reported below: 589 S. W. 2d 434.

No. 79–6362. DOBBERT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 375 So. 2d 1069.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 79–6383. BRIGGS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 179 Conn. 328, 426 A. 2d 298.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Due Process Clause of the Fourteenth Amendment forbids the use for impeachment purposes of evidence that a defendant remained silent after receiving the *Miranda* warnings at the time of his arrest. *Doyle* v. *Ohio*, 426 U. S. 610 (1976). At petitioner's criminal trial, the prosecutor repeatedly brought before the jury the fact that petitioner had not furnished police officers with his alibi at the time of his arrest. Respondent concedes, and the Supreme Court of Connecticut agreed, that such use of petitioner's postarrest silence violated petitioner's constitutional rights. Nevertheless, the court sustained the conviction, over Justice Bogdanski's dissent, on the ground that the error was harmless beyond a reasonable doubt. I share Justice Bogdanski's "unreasonable" belief that the violation of petitioner's rights was not constitutionally harmless. A finding of harmless error on this record, in my view, can be nothing other than a means of avoiding the requirements of the Constitution in order to sustain the conviction of a defendant the court believed was factually guilty.

Petitioner's defense was that he was in the company of his wife and was nowhere near the scene of the alleged crimes at the time they were committed. Petitioner's wife testified to that effect, and petitioner's testimony corroborated hers. On cross-examination, the prosecutor repeatedly forced petitioner to admit that he had not given his story to the police after receiving *Miranda* warnings. The cross-examination which the Connecticut Supreme Court held to be harmless beyond a reasonable doubt was as follows:

> "Q. Did you ever recall telling the police officer that you had gone to court in Stamford on June 8th [the date of the alleged offense]?
>
> "A. Yes.
>
> . . . . .
>
> "Q. Did you ever tell the police officer on June 15th [the date petitioner was arrested] that you were home from 6:45 to 8:55 in the morning?
>
> "[Defense counsel's objection was overruled.]
>
> "A. No, I never told them nothing. Not anything.
>
> "Q. Did you tell them that you were wearing red pants, red T-shirt and blue jacket, white, red and blue sneakers, at 6:15 on June—
>
> "A. I did not tell the police officer nothing.
>
> "Q. Did you ever tell them that you went to court with your wife and Kareen?
>
> "A. Pardon me?
>
> "Q. Did you ever tell them that you went to court with your wife and Kareen—the boy?
>
> "A. Well, I started—I almost started a conversation but I cut it.
>
> "Q. Did you ever tell the police officer what time you arrived at the court in Stamford?
>
> "A. I did not tell the police officer nothing." 179 Conn. 328, 334, n. 1, 426 A. 2d 298, 302, n. 1 (1979).

As if this colloquy did not sufficiently prejudice petitioner before the jury, the prosecutor called a police officer in rebuttal, who testified as follows:

"Q. And after you advised him of his rights, did he give any information with respect to his whereabouts on June 8th of 1977?

"A. The only information he would tell us was that he was in court on June 8th.

"Q. Did he tell you what time he was in court?

"A. No, he didn't.

"Q. Did he tell you what judge—

"[Defense counsel's objection was overruled.]

"Q. [by the Court] What time did he said [*sic*] he arrived in court?

"A. He didn't tell me.

"Q. [by the prosecutor] Did you ask him?

"A. Yes.

. . . . .

"Q. Is there anything in your report with respect to the conversation you had with her or with Mr. Briggs?

"A. Yes, there is.

"Q. And may I see that, please?

"A. This is the accused, and what he said. Refused to give a statement." *Id.*, at 334–335, n. 2, 426 A. 2d, at 302, n. 2.

The repeated, cumulative impermissible references to petitioner's constitutionally protected silence were obviously designed to imply that his defense was fabricated. The prosecutor knew very well that the defendant had remained silent after receiving *Miranda* warnings, and his questions were designed to hammer that fact home to the jury.

In holding that these repeated constitutional violations were harmless error, the Connecticut Supreme Court purported to apply a standard that has been adopted by several federal courts, namely, "'[w]hen there is but a single reference at

trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error.'" *Id.*, at 336, 426 A. 2d, at 303, quoting *State* v. *Zeko*, 177 Conn. 545, 555, 418 A. 2d 917, 922 (1979). Accord, *Chapman* v. *United States*, 547 F. 2d 1240, 1250 (CA5), cert. denied, 431 U. S. 908 (1977); *Leake* v. *Cox*, 432 F. 2d 982, 984 (CA4 1970). Even on the assumption that this was the appropriate standard, it is plain that the violations in this case were not harmless error. There were multiple references to petitioner's silence; the references were linked—in detail—with petitioner's exculpatory story; and petitioner's alibi defense was not transparently frivolous.* Nevertheless, the court concluded that "the defendant's silence was not so 'highlighted' by the prosecutor as to constitute prejudicial error" and that the comments had not " 'struck at the jugular' of the defendant's defense." 179 Conn., at 337, 426 A. 2d, at 303.

This case exemplifies a disturbing and increasingly widespread trend among some courts to sanction egregious violations of the constitutional rights of criminal defendants by blandly reciting the formula "harmless error" whenever it appears that the accused was factually guilty. Our limited ability to exercise our certiorari jurisdiction prevents us from effectively policing the nullification of constitutional requirements through the abuse of the harmless-error doctrine; nor is it our role to correct such factual errors. Our judicial system relies on conscientious trial and appellate courts to assure that all persons accused of criminal offenses receive the full protections guaranteed them by the Constitution. Because this case exemplifies a serious failure to accept that weighty responsibility, I would grant the petition.

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*Petitioner's wife and another witness testified to his whereabouts; the fact that the State presented three witnesses who controverted petitioner's alibi defense does not necessarily mean the defense was frivolous.

Rehearing Denied

No. 78–1840. CITY OF ROME ET AL. *v.* UNITED STATES ET AL., 446 U. S. 156;

No. 78–5928. WALLER *v.* UNITED STATES, 446 U. S. 901;

No. 79–1096. PEARSON *v.* TEXAS, 446 U. S. 912;

No. 79–1148. SPARKS *v.* UNITED STATES, 446 U. S. 908;

No. 79–6161. HOHENSEE *v.* SOUTHARD ET AL., 446 U. S. 911;

No. 79–6183. COOPER *v.* CITY OF COMMERCE CITY, COLORADO, 446 U. S. 912; and

No. 79–6206. KICKASOLA *v.* JIM WALLACE OIL CO., INC., ET AL., 446 U. S. 921. Petitions for rehearing denied.

No. 78–671. DELAWARE STATE BOARD OF EDUCATION *v.* EVANS ET AL., 446 U. S. 923; and

No. 78–672. ALEXIS I. DU PONT SCHOOL DISTRICT ET AL. *v.* EVANS ET AL., 446 U. S. 923. Petitions for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

JUNE 10, 1980

Affirmed on Appeal. (See No. 78–60, *ante,* at 164–165, n. 32.)

JUNE 12, 1980

Miscellaneous Order

No. A–1080. DEVINGO ET AL. *v.* NEW JERSEY. Application for stay of trial court proceedings, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

JUNE 16, 1980

Appeals Dismissed

No. 79–1588. FEDERATION FOR AMERICAN IMMIGRATION REFORM ET AL. *v.* KLUTZNICK, SECRETARY OF COMMERCE, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction. Reported below: 486 F. Supp. 564.

No. 79–843. EXXON CORP. *v.* SOUTH CAROLINA TAX COMMISSION. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. MR. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 273 S. C. 594, 258 S. E. 2d 93.

No. 79–1615. HALL *v.* CALIFORNIA ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 614 F. 2d 776.

No. 79–1678. BRIGGS *v.* CALIFORNIA EX REL. DEPARTMENT OF PARKS AND RECREATION. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 98 Cal. App. 3d 190, 159 Cal. Rptr. 390.

No. 79–6489. LINDEN *v.* NEW YORK. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 622 F. 2d 574.

No. 79–1670. AVIS RENT-A-CAR SYSTEMS, INC. *v.* VINING ET UX. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 378 So. 2d 280.

Certiorari Granted—Reversed. (See No. 79–1377, *ante*, p. 404.)

Certiorari Granted—Vacated and Remanded

No. 78–1531. FRANZEN, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* ALLEN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted.

Judgment vacated and case remanded for further consideration in light of *Jenkins* v. *Anderson*, *ante*, p. 231. Reported below: 591 F. 2d 391.

No. 79–1435. MAHONING WOMEN'S CENTER *v.* HUNTER, MAYOR OF YOUNGSTOWN, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *New York Gaslight Club, Inc.* v. *Carey*, *ante*, p. 54, and *Supreme Court of Virginia* v. *Consumers Union*, 446 U. S. 719 (1980). MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS dissent. Reported below: 610 F. 2d 456.

Miscellaneous Orders

No. A–994. MACHINISTS NON-PARTISAN POLITICAL LEAGUE *v.* FEDERAL ELECTION COMMISSION. Application for stay of execution and enforcement of the order of the United States District Court for the District of Columbia, entered January 30, 1980, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. The order entered by THE CHIEF JUSTICE on May 23, 1980, is vacated.

No. A–1053. BURLINGTON NORTHERN, INC., ET AL. *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. Application for an order to vacate the stay entered by the United States Court of Appeals for the Fifth Circuit on May 30, 1980, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. 79–1690. STANTON, ADMINISTRATOR, INDIANA DEPARTMENT OF PUBLIC WELFARE *v.* BROWN ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. A–1019 (79–1909). CALIFORNIA *v.* MUSANTE. Ct. App. Cal., 4th App. Dist. Application for stay, addressed to MR. JUSTICE WHITE and referred to the Court, denied.

No. 79–5903. H. L. *v.* MATHESON, GOVERNOR OF UTAH, ET AL. Sup. Ct. Utah. [Probable jurisdiction noted, 445 U. S. 903.] Motion for reconsideration of motion for appointment of Alan Ernest as counsel for children unborn and born alive denied.

No. 79–6639. HARRIS *v.* HAMBRICK, WARDEN; and
No. 79–6669. BATTLE *v.* CHRISTENSEN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 79–6546. THERIAULT *v.* SILBER ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Postponed

No. 79–678. SAN DIEGO GAS & ELECTRIC CO. *v.* CITY OF SAN DIEGO ET AL. Appeal from Ct. App. Cal., 4th App. Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

No. 79–1689. UNITED STATES *v.* WILL ET AL. Appeal from D. C. N. D. Ill. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Motion of the Solicitor General to consolidate this case with No. 79–983, *United States* v. *Will et al.* [probable jurisdiction postponed, 444 U. S. 1068], for briefing and oral argument granted. A total of one and one-half hours allotted for oral argument.

Certiorari Granted

No. 79–972. WESTVACO CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. Certiorari granted and case set for oral argument in tandem with No. 79–1056, *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL–CIO, et al.*, immediately *infra*. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 606 F. 2d 319.

No. 79–1056. NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari granted and case set for oral argument in tandem with No. 79–972, *Westvaco Corp. et al.* v. *Adams Extract Co. et al.*, immediately *supra*. MR. JUSTICE BLACKMUN took no part in the consideration or decision of the motion and petition. Reported below: 196 U. S. App. D. C. 443, 606 F. 2d 1350.

No. 79–1203. LUCKY MC URANIUM CORP. *v.* GEOMET EXPLORATION, LTD. Sup. Ct. Ariz. Motion of Arizona Mining Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 124 Ariz. 55, 601 P. 2d 1339.

No. 79–1236. CARSON ET AL. *v.* AMERICAN BRANDS, INC., T/A AMERICAN TOBACCO CO., ET AL. C. A. 4th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 606 F. 2d 420.

No. 79–1764. TEXAS DEPARTMENT OF COMMUNITY AFFAIRS *v.* BURDINE. C. A. 5th Cir. Certiorari granted. Reported below: 608 F. 2d 563.

Certiorari Denied. (See also Nos. 79–1615, 79–1678, and 79–6489, *supra*.)

No. 79–1333. RADO *v.* CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 572.

No. 79–1392. GOTTSCHALK *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 602 P. 2d 448.

No. 79–1422. AZZARELLI CONSTRUCTION CO. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 612 F. 2d 292.

No. 79–1424. CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *v.* LEGAL AID SOCIETY OF ALAMEDA COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1319.

No. 79–1433. MASKENY ET AL. *v.* UNITED STATES; and
No. 79–1532. DARWIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 183.

No. 79–1448. NAGATA BROTHERS FARMS *v.* AGRICULTURAL LABOR RELATIONS BOARD OF CALIFORNIA (UNITED FARM WORKERS OF AMERICA, AFL–CIO, REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari denied.

No. 79–1463. KLINE ET AL. *v.* BLAKE. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 718.

No. 79–1464. WILLIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79–1467. STEVENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 1226.

No. 79–1487. ASHWORTH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 79–1496. ASSOCIATION OF NATIONAL ADVERTISERS, INC., ET AL. *v.* FEDERAL TRADE COMMISSION ET AL.; and
No. 79–1501. KELLOGG CO. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 165, 627 F. 2d 1151.

No. 79–1509. COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE *v.* BERGLAND, SECRETARY OF AGRICULTURE. C. A. D. C. Cir. Certiorari denied. Reported below: 200 U. S. App. D. C. 11, 626 F. 2d 875.

No. 79–1514. BALTIMORE REBUILDERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 611 F. 2d 1372.

No. 79–1523. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 196 U. S. App. D. C. 187, 606 F. 2d 1094.

No. 79–1542. ANDRULIS ET AL. *v.* UNITED STATES ET AL; and

No. 79–1543. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 259, 609 F. 2d 514.

No. 79–1547. SHAUFLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–1548. HAYES ET AL. *v.* ROGERS. Sup. Ct. Fla. Certiorari denied. Reported below: 378 So. 2d 1212.

No. 79–1550. LANE PROCESSING, INC. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari denied. Reported below: 606 F. 2d 518.

No. 79–1551. SIX NATIONS CONFEDERACY *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 54, 610 F. 2d 996.

No. 79–1561. CARPENTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 113.

No. 79–1575. DEMILIA ET AL. *v.* NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 536, 421 N. Y. S. 2d 70.

No. 79–1577. HEILMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 1133.

No. 79–1614. RILEY, ADMINISTRATRIX, ET AL. *v.* GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 110.

No. 79–1623. INDIANA & MICHIGAN ELECTRIC CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 811.

No. 79–1642. PATTERSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 267 Ark. 436, 591 S. W. 2d 356.

No. 79–1649. MURRAY ET AL. *v.* ALEXANDER TITLE AGENCY, INC., ET AL. Ct. App. D. C. Certiorari denied.

No. 79–1658. IN RE WALKER. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 411 A. 2d 1024.

No. 79–1659. DESERT OUTDOOR ADVERTISING, INC. *v.* DEPARTMENT OF TRANSPORTATION OF CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–1660. KLEVE *v.* KLEVE. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 79–1664. RENNERT *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–1666. FLETCHER *v.* CALIFORNIA PORTLAND CEMENT CO., INC. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 99 Cal. App. 3d 97, 159 Cal. Rptr. 915.

No. 79–1671. WARNER ET AL. *v.* SOVEREIGN NEWS CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 610 F. 2d 428.

No. 79–1676. WHITE *v.* ARLEN REALTY & DEVELOPMENT CORP. C. A. 4th Cir. Certiorari denied. Reported below: 614 F. 2d 387.

No. 79–1680. GARDNER BENDER, INC. *v.* IDEAL INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 612 F. 2d 1018.

No. 79–1681. KAPLAN, TRUSTEE IN BANKRUPTCY *v.* BURROUGHS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 611 F. 2d 286.

No. 79–1682. ZECCOLA *v.* EZZO ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 370 So. 2d 38.

No. 79–1683. FIRST BEVERAGES, INC. OF LAS VEGAS, ET AL. *v.* ROYAL CROWN COLA CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1164.

No. 79–1695. ELECTRI-FLEX CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1103.

No. 79–1698. MATSIS *v.* MATSIS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 849, 422 N. Y. S. 2d 550.

No. 79–1701. HAMILTON *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 605 P. 2d 1121.

No. 79–1702. CARTER *v.* CROWN HOSIERY MILLS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 96.

No. 79–1714. ALEXANDER *v.* LOS ANGELES COUNTY CIVIL SERVICE COMMISSION ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–1749. UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO. 68 *v.* BEXAR PLUMBING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 816.

No. 79–1780. FELS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–1800. LAUGHMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 1067.

No. 79–1812. LIGGETT *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 72–1822. NEFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 1235.

No. 79–1826. CARCAISE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1321.

No. 79–1827. FARESE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 1376.

No. 79–1832. GROSS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 365.

No. 79–6192. ADDERLEY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 577.

No. 79–6199. PANZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 432.

No. 79–6208. KIRK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 76 Ill. App. 3d 459, 394 N. E. 2d 1212.

No. 79–6209. STANLEY ET AL. *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 379.

No. 79–6216. LANE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 179 Conn. 327, 426 A. 2d 297.

No. 79–6218. CARROLL *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 774.

No. 79–6220. TATES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 432.

No. 79–6231. MILLER *v.* UNITED STATES; and
No. 79–6238. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1089.

No. 79–6263. RODRIGUEZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79–6272. MAMBRETTI *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–6279. STANLEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 651, 406 A. 2d 693.

No. 78–6286. LAWSON, AKA CARR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79–6295. RIGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1007.

No. 79–6313. GARRIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 626.

No. 79–6317. ARMSTRONG *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 77 Ill. App. 3d 916, 396 N. E. 2d 845.

No. 79–6329. BAUMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 634.

No. 79–6340. DUNBAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 985 and 614 F. 2d 39.

No. 79–6374. ANTONELLI *v.* TRIBUNE NEWSPAPER ET AL. C. A. 7th Cir. Certiorari denied.

No. 79–6394. JONES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 613, 424 N. Y. S. 2d 497.

No. 79–6413. KORTE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–6419. BROWN *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 199 U. S. App. D. C. 9, 615 F. 2d 1368.

No. 79–6425. EL FUNDI ET UX. *v.* DEROCHE ET AL. C. A. 8th Cir. Certiorari denied.

No. 79–6432. DUFFIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–6442. PULLIAM *v.* BALKCOM, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 99, 263 S. E. 2d 123.

No. 79–6471. MCMILLAN *v.* MAHONEY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1357.

No. 79–6476. ROBERTS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 1104, 399 N. E. 2d 1390.

No. 79–6478. HARDY *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 77 Ill. App. 3d 37, 395 N. E. 2d 743.

No. 79–6479. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 618 F. 2d 411.

No. 79–6485. ROSENTHAL *v.* CARR. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 1219.

No. 79–6487. CRISAFI *v.* WIETHE. C. A. 3d Cir. Certiorari denied.

No. 79–6488. WOODARD *v.* WACHOVIA BANK & TRUST CO. ET AL. C. A. 4th Cir. Certiorari denied.

No. 79–6490. ROBINSON *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 307.

No. 79–6491. COLLINS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 378 So. 2d 928.

No. 79–6493. GRIFFITH ET AL. *v.* BELL-WHITLEY COMMUNITY ACTION AGENCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 1102.

No. 79–6502. KINES *v.* BUTTERWORTH. C. A. 1st Cir. Certiorari denied. Reported below: 618 F. 2d 93.

No. 79–6504. IN RE R. R. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 494, 394 N. E. 2d 75.

No. 79–6509. SNELL *v.* NATIONAL RAILROAD PASSENGER CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 574.

No. 79–6510. TAYLOR *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79–6511. SCHMOLL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 77 Ill. App. 3d 762, 396 N. E. 2d 634.

No. 79–6532. BOHONUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1167.

No. 79–6537. WILSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 592 S. W. 2d 465.

No. 79–6587. WILLIAMS *v.* AMERICAN AIRLINES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1007.

No. 79–6596. LEONARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 623 F. 2d 746.

No. 79–6604. CAMPOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 311.

No. 79–6605. WESTOVER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 565.

No. 79–6611. PEREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 306.

No. 79–6612. GRAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–6618. HUGULEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 187.

No. 79–6625. COMEAUX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79–6629. CARNES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 68.

No. 79–6637. LENZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 616 F. 2d 960.

No. 79–1352. HART BOOK STORES, INC., ET AL. *v.* EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant the petition for certiorari, reverse the judgment of the Court of Appeals, and reinstate the judgments of July 21, 1978, entered in the United States District Court for the Western District of North Carolina and of April 21, 1978, entered in the United States District Court for the Eastern District of North Carolina declaring unconstitutional N. C. Gen. Stat. §§ 14–202.10 to 14–202.12. Reported below: 612 F. 2d 821.

No. 79–1605. MOODY, ASSISTANT CORRECTIONAL SUPERINTENDENT *v.* MCNAMARA. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 606 F. 2d 621.

No. 79–1723. SUTKER, DBA ALL-STATE DENTAL LABORATORY *v.* ILLINOIS STATE DENTAL SOCIETY ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 76 Ill. App. 3d 240, 395 N. E. 2d 14.

No. 79–6276. FISHER *v.* REISER, CHAIRMAN OF NEVADA INDUSTRIAL COMMISSION, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 610 F. 2d 629.

No. 79–6470. FRANKLIN *v.* GEORGIA. Sup. Ct. Ga.; and
No. 79–6614. DOBBS *v.* HOPPER, WARDEN. Super. Ct. Ga., Tattnall County. Certiorari denied. Reported below: No. 79–6470, 245 Ga. 141, 263 S. E. 2d 666.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Petition for rehearing of the order of the Court entered April 28, 1980 [446 U. S. 253], denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 77–6219. BALDASAR *v.* ILLINOIS, 446 U. S. 222;
No. 79–1141. MORA *v.* FLORIDA, 446 U. S. 917;
No. 79–1309. SEIBERT *v.* BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL., 446 U. S. 918;
No. 79–1468. SEYFARTH *v.* LOVRET, 446 U. S. 919; and
No. 79–1495. SAPPINGTON *v.* BECKERT, JUDGE, ET AL., 446 U. S. 931. Petitions for rehearing denied.

No. 79–6264. CHRISTENSEN *v.* COMMISSIONER OF INTERNAL REVENUE, 446 U. S. 943; and

No. 79–6417. TURNER *v.* GRAHAM, GOVERNOR OF FLORIDA, ET AL., 446 U. S. 934. Petitions for rehearing denied.

No. 79–1347. SPENCER *v.* GREYHOUND LINES, INC., ET AL., 446 U. S. 909. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

JUNE 20, 1980

Dismissal Under Rule 60

No. 79–1747. PENTHOUSE INTERNATIONAL, LTD. *v.* MCAULIFFE, SOLICITOR GENERAL OF FULTON COUNTY, GEORGIA. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 610 F. 2d 1353.

JUNE 23, 1980

Certiorari Granted—Vacated and Remanded

No. 79–5080. WILLEFORD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Hicks* v. *Oklahoma*, *ante*, p. 343.

No. 79–5145. SAM *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Hicks* v. *Oklahoma*, *ante*, p. 343.

No. 79–5338. BYNUM *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bifulco* v. *United States*, *ante*, p. 381. Reported below: 605 F. 2d 1206.

No. 79–5184. LAUREL *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Treating the motion for leave to file and the petition for writ of mandamus as a petition for writ of certiorari, certiorari granted. Order vacated and case remanded for further consideration in light of *Bifulco* v. *United States*, *ante*, p. 381.

No. 79–5530. MEYER *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bifulco* v. *United States*, *ante*, p. 381. Reported below: 609 F. 2d 511.

No. 79–5485. SELLERS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bifulco* v. *United States*, *ante*, p. 381. Reported below: 603 F. 2d 53.

No. 79–5555. CATES *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bifulco* v. *United States*, *ante*, p. 381. Reported below: 599 F. 2d 447.

No. 79–5584. SEPULVEDA *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bifulco* v. *United States*, *ante*, p. 381. Reported below: 607 F. 2d 998.

Vacated and Remanded After Certiorari Granted

No. 79–5267. PEREZ *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. [Certiorari granted, 444 U. S. 1070.] Judgment vacated and case remanded for further consideration in light of the decision in *Cuyler* v. *Sullivan*, 446 U. S. 335, 342–345

(1980), on the application of the Sixth and Fourteenth Amendments to claims arising from the conduct of retained counsel. Reported below: 594 F. 2d 159.

Miscellaneous Orders

No. A–980. HAMPEL *v.* MOTEL PROPERTIES, INC. Application to stay the judgment of the Supreme Court of Georgia, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–1056. DELONG *v.* UNITED STATES. Application for stay of the mandate of the United States Court of Appeals for the Fourth Circuit, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A–1079. RUDOLF WOLFF & CO., LTD. *v.* NEIMAN, DBA THE LONDON GROUP (1974). Application to recall and stay the mandate of the United States Court of Appeals for the Seventh Circuit, addressed to MR. JUSTICE WHITE and referred to the Court, denied.

No. D–185. IN RE DISBARMENT OF MITCHELL. Disbarment entered. [For earlier order herein, see 446 U. S. 906.]

No. 79–408. CITY OF MILWAUKEE ET AL. *v.* ILLINOIS ET AL. C. A. 7th Cir. [Certiorari granted, 445 U. S. 926.] Motions of Mid-America Legal Foundation and National League of Cities et al. for leave to file briefs as *amici curiae* granted.

No. 79–824. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–825. INSILCO BROADCASTING CORP. ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–826. AMERICAN BROADCASTING COS., INC., ET AL. *v.* WNCN LISTENERS GUILD ET AL.; and

No. 79–827. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* WNCN LISTENERS GUILD ET AL. C. A. D. C. Cir. [Certiorari granted, 445 U. S. 914.] Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 78–1945. UNIVERSITIES RESEARCH ASSN., INC. *v.* COUTU. C. A. 7th Cir. [Certiorari granted, 445 U. S. 925.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted, and five additional minutes allotted for that purpose. Respondent also allotted five additional minutes for oral argument.

No. 79–838. MAINE ET AL. *v.* THIBOUTOT ET VIR. Sup. Jud. Ct. Me. [Certiorari granted, 444 U. S. 1042.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 79–1127. ESTELLE, CORRECTIONS DIRECTOR *v.* SMITH. C. A. 5th Cir. [Certiorari granted, 445 U. S. 926.] Motion of American Psychiatric Association for leave to file a brief as *amicus curiae* granted.

No. 79–1186. DENNIS *v.* SPARKS ET AL., DBA SIDNEY A. SPARKS, TRUSTEE. C. A. 5th Cir. [Certiorari granted, 445 U. S. 942.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 79–1420. FIRESTONE TIRE & RUBBER CO. *v.* RISJORD. C. A. 8th Cir. [Certiorari granted, 446 U. S. 934.] Motion of respondent to supplement the record granted.

No. A–1072 (79–1893). FREEDOM INSTITUTE OF AMERICA ET AL. *v.* NEW JERSEY. Application for release of Rev. Jerome Heinemann, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. 79–1941. DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* SHERWOOD. C. C. P. A. Motion of respondents to expedite consideration of the petition for writ of certiorari denied.

Certiorari Denied

No. 79–415. UNITED STATES *v.* MEARNS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 599 F. 2d 1296.

No. 79–1399. STRAWBERRY WATER USERS ASSN. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 222 Ct. Cl. 130, 611 F. 2d 838.

No. 79–1840. SCARBOROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 62.

No. 79–6167. WYMORE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 377 So. 2d 283.

No. 79–6227. ROSARIO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79–6592. WILKERSON *v.* WILKERSON ET AL. Ct. App. D. C. Certiorari denied.

No. 79–735. SEARS, ROEBUCK & CO. *v.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 25 Cal. 3d 317, 599 P. 2d 676.

No. 79–1308. BUTTERWORTH, CORRECTIONAL SUPERINTENDENT *v.* LOVETT. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 610 F. 2d 1002.

No. 79–1576. MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* DILDA ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 612 F. 2d 1055.

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Conviction of traffic offense—Subsequent manslaughter prosecution.—Double Jeopardy Clause does not prohibit Illinois from prosecuting for involuntary manslaughter driver of car involved in a fatal accident who previously was convicted for failing to reduce speed to avoid accident which resulted in victim's death, if under Illinois law manslaughter by automobile does not always entail proof of a failure to reduce speed and if State in manslaughter prosecution does not rely on a failure to reduce

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speed as reckless act necessary to prove manslaughter. Illinois v. Vitale, p. 410.

III. Due Process.

1. *Accused's postarrest statements—State's use for impeachment.*—Cross-examination of respondent at his state murder trial as to why he told jury on direct examination a different story about stealing murder victim's car than he told police after arrest and after receiving *Miranda* warnings did not violate due process, since rule prohibiting impeachment on basis of a defendant's silence following *Miranda* warnings does not apply to cross-examination that merely inquires into prior inconsistent statements. Anderson v. Charles, p. 404.

2. *Corporate income taxes—Validity of state apportionment formula.*—Due Process Clause of Fourteenth Amendment did not prevent Wisconsin, in determining state income taxes, from applying its statutory apportionment formula to total income of vertically integrated petroleum company doing business in several States, including company's income derived from extraction of oil and gas outside Wisconsin, notwithstanding company's use of a separate functional accounting system reflecting its income derived only from its marketing operations in Wisconsin, since such operations were integral parts of company's unitary business; nor did Commerce Clause require Wisconsin to allocate all income derived from company's exploration and production function to situs State rather than include such income in apportionment formula. Exxon Corp. v. Wisconsin Dept. of Revenue, p. 207.

3. *Death sentence—Consideration of lesser included offense.*—A death sentence may not constitutionally be imposed after a jury verdict of guilt of a capital offense where jury was not permitted to consider a verdict of guilt of a lesser included offense, since denying jury option of convicting of a lesser included offense, in addition to options of convicting of capital offense or acquitting defendant, denies defendant full benefit of reasonable-doubt standard. Beck v. Alabama, p. 625.

4. *Decertification of nursing home for government assistance—Patients' right to hearing.*—Patients at nursing home which provided care at government expense under Medicare and Medicaid provider agreements had no such interest in receiving benefits for care in such home that entitled them, as a matter of constitutional law, to a hearing before home was decertified as a qualified nursing home by Department of Health, Education, and Welfare and state agency. O'Bannon v. Town Court Nursing Center, p. 773.

5. *Fair trial—Defendant's prearrest silence—Impeachment.*—State's use of prearrest silence to impeach a criminal defendant's credibility after he testifies in his own defense does not deny him fundamental fairness guaranteed by Fourteenth Amendment. Jenkins v. Anderson, p. 231.

CONSTITUTIONAL LAW—Continued.

6. *State conviction—Sentence.*—Petitioner was deprived of due process where (1) jury, upon state conviction, imposed a 40-year sentence pursuant to instructions to do so under an Oklahoma statute mandating such a sentence for a twice previously convicted felon, (2) such statute was subsequently declared unconstitutional by state appellate court in another case, (3) thereafter that court nevertheless held that petitioner was not prejudiced because his sentence was within range of punishment that could have been imposed in any event, but (4) if petitioner's jury had been correctly instructed it could have imposed any sentence of not less than 10 years. Hicks v. Oklahoma, p. 343.

IV. Eminent Domain.

Land use—Validity of zoning ordinances.—City's zoning ordinances, adopted after appellants had acquired unimproved land for residential development, which ordinances imposed certain density restrictions on land, do not on their face take appellants' property without just compensation in violation of Fifth and Fourteenth Amendments, but instead constitute proper exercises of city's police power to protect its residents from ill effects of urbanization. Agins v. Tiburon, p. 255.

V. Equal Protection of the Laws.

Prohibition against residential picketing—Validity of statute.—An Illinois statute which prohibits picketing of residences but exempts peaceful picketing of a place of employment involved in a labor dispute violates Equal Protection Clause of Fourteenth Amendment since it makes an impermissible distinction between peaceful labor picketing and other peaceful picketing. Carey v. Brown, p. 455.

VI. Freedom of Speech.

1. *Electric utilities—Ban on advertising.*—New York Public Service Commission's regulation completely banning electric utilities from advertising to promote use of electricity violates First and Fourteenth Amendments. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, p. 557.

2. *Public utilities—Ban on public policy bill inserts.*—New York Public Service Commission's order prohibiting inclusion by public utility companies in monthly bills of inserts discussing controversial issues of public policy is invalid as infringing freedom of speech protected by First and Fourteenth Amendments. Consolidated Edison Co. v. Public Service Comm'n, p. 530.

3. *Shopping center—Soliciting signatures for petitions.*—California's constitutional provisions, as construed to permit individuals reasonably to exercise free speech and petition rights in privately owned shopping center's courtyard by soliciting for signatures from passersby for petitions,

CONSTITUTIONAL LAW—Continued.

do not violate shopping center owner's free speech or property rights under First, Fifth, and Fourteenth Amendments. PruneYard Shopping Center v. Robins, p. 74.

VII. Privilege Against Self-Incrimination.

Prearrest silence—Impeachment.—Fifth Amendment is not violated by State's use of prearrest silence to impeach a criminal defendant's credibility after he testifies in his own defense. Jenkins v. Anderson, p. 231.

VIII. Right to Counsel.

Incriminating statements—Paid Government informer.—Respondent's Sixth Amendment right to assistance of counsel was violated by admission at his federal criminal trial of incriminating statements made by him, while in jail pending trial, to another prisoner who was a paid Government informer, and respondent, who was unaware that informer was acting for Government, cannot be held to have waived his right to assistance of counsel. United States v. Henry, p. 264.

IX. Right to Jury Trial.

Six-person jury—Invalidity of nonunanimous verdict—Retroactivity of decision.—Louisiana Supreme Court's judgment affirming petitioner's felony conviction and concluding that rule of *Burch* v. *Louisiana*, 441 U. S. 130—which held that provisions of Louisiana's Constitution and statutes that sanctioned conviction of a nonpetty offense by a nonunanimous jury of six violated an accused's right to trial by jury under Sixth and Fourteenth Amendments to Federal Constitution—should not be applied retroactively to cases tried by juries empaneled prior to date of that decision, is reversed, and case is remanded. Brown v. Louisiana, p. 323.

X. Searches and Seizures.

1. *Illegal seizure from third party—Defendant's standing to suppress evidence.*—In a prosecution for falsifying a federal income tax return, defendant lacked Fourth Amendment standing to suppress documents illegally seized from a bank officer by an illegal search of his briefcase, and supervisory power of federal courts does not authorize a court to suppress otherwise admissible evidence on ground that it was seized unlawfully from a third party not before court. United States v. Payner, p. 727.

2. *Obscene films—Warrantless viewing.*—A Court of Appeals' judgments affirming petitioners' convictions of federal obscenity charges relating to interstate transportation of movie films are reversed, where, after films had been mistakenly delivered to a third party, FBI agents viewed films without attempting to obtain a warrant or to contact consignor or consignee of films. Walter v. United States, p. 649.

CONSUMER PRODUCT SAFETY ACT.

Disclosure of information furnished by manufacturers.—Section 6 (b) (1) of Act, which prescribes procedure whereby Consumer Product Safety Commission must notify manufacturer before making public disclosure of consumer-product information obtained from manufacturer and must afford manufacturer an opportunity to submit comments regarding information, governs disclosures of records by Commission pursuant to requests under Freedom of Information Act, not just disclosures affirmatively undertaken by Commission. Consumer Product Safety Comm'n v. GTE Sylvania, Inc., p. 102.

CONTAINERIZED SHIPPING. See **National Labor Relations Act**, 1.

CONTRABAND. See **Taxes**, 2.

CONTROLLED SUBSTANCES. See **Comprehensive Drug Abuse Prevention and Control Act of 1970.**

CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE. See **Submerged Lands Act.**

CORPORATE INCOME TAXES. See **Constitutional Law**, III, 2.

COSTS. See **Attorney's Fees.**

CRIMINAL LAW. See also **Comprehensive Drug Abuse Prevention and Control Act of 1970; Constitutional Law**, II; III, 1, 3, 5, 6; VII; VIII; IX; X; **Federal Magistrates Act; Indians.**

Aiders and abettors—Effect of acquittal of alleged perpetrator.—A defendant accused of aiding and abetting in commission of a federal offense may properly be convicted despite prior acquittal of alleged actual perpetrator of offense; thus, even though Internal Revenue Service agent was acquitted of certain charges of accepting unlawful compensation, petitioner was properly convicted under 18 U. S. C. § 2 for aiding and abetting agent in commission of such offenses. Standefer v. United States, p. 10.

DEATH PENALTY. See **Constitutional Law**, III, 3.

DECERTIFICATION OF NURSING HOME FOR GOVERNMENT ASSISTANCE. See **Constitutional Law**, III, 4.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Constitutional Law**, III, 4.

DISCLOSURE OF INFORMATION. See **Consumer Product Safety Act.**

DISCRIMINATION AGAINST OUT-OF-STATE BUSINESSES. See **Constitutional Law**, I.

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1964.**

DISTRICT COURTS. See **Constitutional Law, X, 1; Federal Magistrates Act; Taxes, 2.**

DOCKS. See **Submerged Lands Act.**

DOUBLE JEOPARDY. See **Constitutional Law, II.**

DRUG OFFENSES. See **Comprehensive Drug Abuse Prevention and Control Act of 1970.**

DUE PROCESS. See **Constitutional Law, III; VI, 3; Federal Magistrates Act.**

EIGHTH AMENDMENT. See **Constitutional Law, III, 3.**

ELECTRIC UTILITIES. See **Constitutional Law, VI, 1.**

EMINENT DOMAIN. See **Constitutional Law, IV.**

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; National Labor Relations Act; Vietnam Era Veterans' Readjustment Assistance Act of 1974.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

ENERGY CONSERVATION. See **Constitutional Law, VI, 1.**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law, V.**

EXCLUSIVE JURISDICTION. See **Special Masters.**

EXEMPTION 3 OF FREEDOM OF INFORMATION ACT. See **Consumer Product Safety Act.**

FAIR TRIAL. See **Constitutional Law, III, 5.**

FALSIFYING TAX RETURNS. See **Constitutional Law, X, 1.**

FEDERAL INCOME TAXES. See **Constitutional Law, X, 1.**

FEDERAL MAGISTRATES ACT.

Suppression motion—Magistrate's recommendation—Review by District Court.—Under Act's provisions for reference to magistrate of motion to suppress defendant's incriminating statements at criminal trial and for District Court's "de novo determination" of magistrate's recommendations upon objection thereto, District Court was not required to rehear testimony on which Magistrate based his recommendations in order to make an independent evaluation of credibility, and statute so construed strikes proper balance between due process demands under Fifth Amendment and constraints of Art. III. United States v. Raddatz, p. 667.

FEDERAL RULES OF CIVIL PROCEDURE. See **Attorney's Fees.**

FEDERAL-STATE RELATIONS. See **Boulder Canyon Project Act; Civil Rights Act of 1964; Constitutional Law, I; Longshoremen's and Harbor Workers' Compensation Act; Submerged Lands Act.**

FELONY MURDER. See **Constitutional Law, III, 3.**

FIFTH AMENDMENT. See **Constitutional Law, II; IV; VI, 3; VII; Federal Magistrates Act.**

"FILING" CLAIM WITH EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964, 2.**

FILMS. See **Constitutional Law, X, 2.**

FIRST AMENDMENT. See **Constitutional Law, V; VI; X, 2; National Labor Relations Act, 2.**

FLORIDA. See **Constitutional Law, I, 1.**

FOURTEENTH AMENDMENT. See **Civil Rights Act of 1964, 1; Constitutional Law, II; III, 1–3, 5, 6; IV; V; VI; VII; IX.**

FOURTH AMENDMENT. See **Constitutional Law, X.**

FREEDOM OF INFORMATION ACT. See **Consumer Product Safety Act.**

FREEDOM OF SPEECH. See **Constitutional Law, V; VI; National Labor Relations Act, 2.**

FREEDOM TO PETITION GOVERNMENT. See **Constitutional Law, VI, 3.**

GENETICALLY ENGINEERED BACTERIA AS PATENTABLE. See **Patents.**

GOVERNMENT INFORMERS. See **Constitutional Law, VIII.**

HABITUAL CRIMINALS. See **Constitutional Law, III, 6.**

HANDBILLS. See **Constitutional Law, VI, 3.**

HARBORS. See **Submerged Lands Act.**

HEALTH, EDUCATION, AND WELFARE DEPARTMENT. See **Constitutional Law, III, 4.**

HUMAN-MADE MICRO-ORGANISMS AS PATENTABLE. See **Patents.**

ILLINOIS. See **Constitutional Law, II; V.**

IMPEACHING CREDIBILITY. See **Constitutional Law, III, 1, 5; VII.**

IMPERIAL VALLEY, CAL. See **Boulder Canyon Project Act.**

INCOME TAXES. See **Constitutional Law, III, 2; X, 1.**

INCRIMINATING STATEMENTS. See **Constitutional Law, VIII; Federal Magistrates Act.**

INDIAN COMMERCE CLAUSE. See **Taxes, 2.**

INDIAN FINANCING ACT OF 1974. See **Taxes, 2.**

INDIAN REORGANIZATION ACT OF 1934. See **Taxes, 2.**

INDIANS. See also **Taxes.**

State jurisdiction over reservations.—District Court erred in holding that Washington's assumption of civil and criminal jurisdiction over certain Indian reservations was unlawful. Washington v. Confederated Tribes, p. 134.

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT OF 1975. See **Taxes, 2.**

INFORMERS. See **Constitutional Law, VIII.**

INSERTS IN PUBLIC UTILITIES' BILLS. See **Constitutional Law, VI, 2.**

INSTRUCTIONS TO JURY. See **Constitutional Law, III, 3, 6.**

INTERNAL REVENUE SERVICE. See **Criminal Law.**

INTERSTATE COMMERCE. See **Constitutional Law, I; III, 2.**

INVENTION. See **Patents.**

INVESTMENT ADVISORY SERVICES. See **Constitutional Law, I, 1.**

INVOLUNTARY MANSLAUGHTER. See **Constitutional Law, II.**

IRRIGATION WATER. See **Boulder Canyon Project Act.**

JURISDICTION. See **Appeals; Indians; Longshoremen's and Harbor Workers' Compensation Act; Special Masters; Taxes, 2.**

JURY INSTRUCTIONS. See **Constitutional Law, III, 3.**

LABOR DISPUTES. See **National Labor Relations Act.**

LAND-BASED INJURIES. See **Longshoremen's and Harbor Workers' Compensation Act.**

LAND-USE RESTRICTIONS. See **Constitutional Law, IV.**

LESSER INCLUDED OFFENSES. See **Constitutional Law, II; III, 3.**

LIBERTY INTERESTS. See **Constitutional Law, III, 4, 6.**

LIMITATION PERIOD FOR FILING CLAIM WITH EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964, 2.**

LIVING THINGS AS PATENTABLE. See **Patents.**

LOADING AND UNLOADING CARGO. See **National Labor Relations Act**, 1.

LONGSHOREMEN. See **Longshoremen's and Harbor Workers' Compensation Act; National Labor Relations Act**, 1.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT. See also **Submerged Lands Act.**

Land-based injuries—Applicability of state law.—A State may apply its workers' compensation scheme to land-based injuries that fall within coverage of federal Act as amended in 1972. Sun Ship, Inc. v. Pennsylvania, p. 715.

LOUISIANA. See **Constitutional Law**, IX.

MAGISTRATES. See **Federal Magistrates Act.**

MANSLAUGHTER. See **Constitutional Law**, II.

MANUFACTURERS. See **Consumer Product Safety Act.**

MARITIME INJURIES. See **Longshoremen's and Harbor Workers' Compensation Act.**

MARKETING OPERATIONS AS AFFECTING CORPORATE TAXES. See **Constitutional Law**, III, 2.

MEDICARE AND MEDICAID. See **Constitutional Law**, III, 4.

MICHIGAN. See **Constitutional Law**, III, 2, 5; VII.

MICRO-ORGANISMS AS PATENTABLE. See **Patents.**

MIRANDA WARNINGS. See **Constitutional Law**, III, 1.

MOBILE HOME, CAMPER, AND TRAILER TAXES. See **Taxes**, 1.

MOTION PICTURES. See **Constitutional Law**, X, 2.

MOTOR VEHICLE TAXES. See **Taxes**, 1.

MULTIPLE OFFENDERS. See **Constitutional Law**, III, 6.

MULTIPLE TAXATION. See **Constitutional Law**, III, 2.

NATIONAL LABOR RELATIONS ACT.

1. *Collective-bargaining agreement—Shipping industry—Validity of rules governing containerized shipping.*—In determining whether rules in collective-bargaining agreement governing technological innovation of use of cargo containers in shipping industry violated Act or were a lawful work preservation agreement—such rules reserving to longshoremen's union right to load and unload at pier only those containers that would otherwise be loaded or unloaded within 50 miles of port by anyone except cargo owner's employees—"work in controversy" must be defined by focusing

NATIONAL LABOR RELATIONS ACT—Continued.

on bargaining unit employees' work, not on work of other employees who may be doing same or similar work, such as truckers and freight consolidators performing off-pier loading and unloading of containers, and relationship between work as it existed before innovation and as agreement proposed to preserve it must be examined. NLRB v. Longshoremen, p. 490.

2. *Illegal secondary picketing.*—Secondary picketing by a union representing the striking employees of a title insurance company at title companies that sold struck insurance company's policies, urging customers to support strike by canceling their policies, violated § 8 (b) (4) (ii) (B) of Act as constituting secondary product picketing that reasonably could be expected to threaten neutral parties with ruin or substantial loss. NLRB v. Retail Store Employees, p. 607.

NEVADA. See **Boundaries; Special Masters.**

NEW BACTERIA AS PATENTABLE. See **Patents.**

NEW YORK. See **Civil Rights Act of 1964; Constitutional Law, VI, 1, 2.**

NEXUS BETWEEN TAXPAYER'S INTERSTATE ACTIVITIES AND TAXING STATE. See **Constitutional Law, III, 2.**

NONLABOR PICKETING. See **Constitutional Law, V.**

NONLOCAL MARITIME INJURIES. See **Longshoremen's and Harbor Workers' Compensation Act.**

NONMUTUAL COLLATERAL ESTOPPEL. See **Criminal Law.**

NONUNANIMOUS VERDICT IN CRIMINAL CASE. See **Constitutional Law, IX.**

NURSING HOMES. See **Constitutional Law, III, 4.**

OBSCENITY. See **Constitutional Law, X, 2.**

OIL AND GAS COMPANIES. See **Constitutional Law, III, 2.**

OKLAHOMA. See **Constitutional Law, III, 6.**

OMNIBUS ADJUSTMENT ACT OF 1926. See **Boulder Canyon Project Act.**

ORIGINAL ACTIONS. See **Boundaries; Special Masters; Submerged Lands Act.**

OUT-OF-STATE BUSINESSES. See **Constitutional Law, I.**

PAID INFORMERS. See **Constitutional Law, VIII.**

PAMPHLETEERS. See **Constitutional Law, VI, 3.**

PAROLE. See **Comprehensive Drug Abuse Prevention and Control Act of 1970.**

PATENTS.

Human-made micro-organisms—Patentability.—A live human-made micro-organism—such as a human-made, genetically engineered bacterium capable of breaking down crude oil, a property which is possessed by no naturally occurring bacteria—is patentable subject matter as constituting a "manufacture" or "composition of matter" within meaning of 35 U. S. C. § 101. Diamond v. Chakrabarty, p. 303.

PENNSYLVANIA. See **Constitutional Law, III, 4; Longshoremen's and Harbor Workers' Compensation Act.**

PERQUISITES OF SENIORITY. See **Vietnam Era Veterans' Readjustment Assistance Act of 1974.**

PETROLEUM COMPANIES. See **Constitutional Law, III, 2.**

PICKETING. See **Constitutional Law, V; National Labor Relations Act, 2.**

PIERS. See **Submerged Lands Act.**

PLANT PATENT ACT. See **Patents.**

PLANT VARIETY PROTECTION ACT. See **Patents.**

POLICE POWERS. See **Constitutional Law, IV; VI, 3.**

POSTARREST SILENCE. See **Constitutional Law, III, 1.**

PREARREST SILENCE. See **Constitutional Law, III, 5; VII.**

PRE-EMPTION. See **Civil Rights Act of 1964, 1; Longshoremen's and Harbor Workers' Compensation Act; Taxes, 2.**

"PRINCIPALS" IN COMMISSION OF CRIME. See **Criminal Law.**

PRISONERS. See **Constitutional Law, VIII.**

PRIVACY. See **Constitutional Law, V; X.**

PRIVATE SEARCH AS EXCUSING GOVERNMENT'S FAILURE TO OBTAIN WARRANT. See **Constitutional Law, X, 1.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law, VII.**

PRODUCT PICKETING. See **National Labor Relations Act, 2.**

PROPRIETARY ACTIVITIES OF STATES. See **Constitutional Law, I, 2.**

PUBLIC DISCLOSURE OF INFORMATION. See **Consumer Product Safety Act.**

PUBLIC UTILITIES. See **Constitutional Law**, VI, 1, 2.

PUNISHMENT FOR ATTEMPTS AND CONSPIRACIES. See **Comprehensive Drug Abuse Prevention and Control Act of 1970.**

RACIAL DISCRIMINATION. See **Attorney's Fees.**

REASONABLE-DOUBT STANDARD. See **Constitutional Law**, III, 3.

RECLAMATION PROJECTS. See **Boulder Canyon Project Act.**

RE-EMPLOYMENT OF VETERANS. See **Vietnam Era Veterans' Readjustment Assistance Act of 1974.**

REFERENCES TO MAGISTRATES. See **Federal Magistrates Act.**

RELIGIOUS DISCRIMINATION. See **Civil Rights Act of 1964**, 2.

RESIDENTIAL LAND DEVELOPMENTS. See **Constitutional Law**, IV.

RESIDENTIAL PICKETING. See **Constitutional Law**, V.

RETROACTIVITY. See **Constitutional Law**, IX.

REVIEW OF MAGISTRATES' DETERMINATIONS. See **Federal Magistrates Act.**

RIGHT TO COUNSEL. See **Constitutional Law**, VIII.

RIGHT TO FAIR TRIAL. See **Constitutional Law**, III, 5.

RIGHT TO JURY TRIAL. See **Constitutional Law**, IX.

RIGHT TO REMAIN SILENT. See **Constitutional Law**, VII.

RULES OF CIVIL PROCEDURE. See **Attorney's Fees.**

SALES OF CEMENT. See **Constitutional Law**, I, 2.

SALES TAXES. See **Taxes**, 2.

SCREENING OF FILMS BY GOVERNMENT AGENTS. See **Constitutional Law**, X, 2.

SEARCHES AND SEIZURES. See **Constitutional Law**, X.

SECONDARY ACTIVITIES OF UNIONS. See **National Labor Relations Act.**

SECOND-DEGREE PRINCIPALS IN COMMISSION OF CRIME. See **Criminal Law.**

SECRETARY OF THE INTERIOR. See **Boulder Canyon Project Act.**

SELF-INCRIMINATION. See **Constitutional Law**, VII.

SENIORITY BENEFITS. See **Vietnam Era Veterans' Readjustment Assistance Act of 1974.**

SHIPPING. See **National Labor Relations Act**, 1.

SHOPPING CENTERS. See **Appeals; Constitutional Law**, VI, 3.

SHORELINE. See **Submerged Lands Act.**

SIX-PERSON JURIES. See **Constitutional Law**, IX.

SIXTH AMENDMENT. See **Constitutional Law**, VIII; IX.

SOLICITING SIGNATURES FOR PETITIONS. See **Appeals; Constitutional Law**, VI, 3.

SOUTH DAKOTA. See **Constitutional Law**, I, 2.

SOVEREIGNTY OF INDIAN TRIBES. See **Taxes.**

SOVEREIGNTY OF STATES. See **Constitutional Law**, I, 2.

SPECIAL MASTERS. See also **Boundaries; Submerged Lands Act.**

Scope of relief—State boundary suit.—In original action between States to determine boundary, Special Master's reference will not be expanded after determination of boundary to authorize him to determine whether United States should be made a party and to make recommendations as to quieting of title on disputed borderlands, where remaining title questions would involve only one or other State and United States, or perhaps various citizens of those States, not disputes between States, such questions thus not falling within Supreme Court's exclusive jurisdiction. California v. Nevada, p. 125.

SPECIAL PAROLE. See **Comprehensive Drug Abuse Prevention and Control Act of 1970.**

STANDING TO APPEAL. See **Boulder Canyon Project Act.**

STANDING TO SUPPRESS EVIDENCE. See **Constitutional Law**, X, 1.

STATE ACTION. See **Constitutional Law**, VI, 2.

STATE BOUNDARIES. See **Boundaries; Special Masters.**

STATE CIGARETTE TAXES. See **Taxes**, 2.

STATE INCOME TAXES. See **Constitutional Law**, III, 2.

STATE JURISDICTION OVER INDIAN RESERVATIONS. See **Indians.**

STATE MOBILE HOME, CAMPER, AND TRAILER TAXES. See **Taxes**, 1.

STATE MOTOR VEHICLE TAXES. See **Taxes**, 1.

STATE-OPERATED BUSINESSES. See **Constitutional Law**, I, 2.

STATE SALES TAXES. See **Taxes**, 2.

STATE'S POLICE POWERS. See **Constitutional Law, VI, 3.**

STEEL INDUSTRY COLLECTIVE-BARGAINING AGREEMENT. See **Vietnam Era Veterans' Readjustment Assistance Act of 1974.**

STRIKES. See **National Labor Relations Act, 2.**

SUBMERGED LANDS ACT.

California coastline—Effect of piers and artificial "island."—For purposes of determining California's ownership under Act of submerged lands and natural resources lying within three miles seaward of California coastline, coastline follows mean lower low-water line along natural shore, not seaward edge of certain piers and of a privately owned artificial "island" connected to mainland and used to service offshore oil facilities. United States v. California, p. 1.

SUBSIDIARIES. See **Constitutional Law, I, 1.**

SUPPLEMENTAL UNEMPLOYMENT BENEFITS. See **Vietnam Era Veterans' Readjustment Assistance Act of 1974.**

SUPREME COURT. See **Appeals; Boundaries; Special Masters; Submerged Lands Act.**

SURVEY OF BOUNDARY. See **Boundaries.**

TAKING OF PROPERTY FOR PUBLIC USE. See **Constitutional Law, IV; VI, 3.**

TAXES. See also **Constitutional Law, III, 2; X, 1.**

1. *Motor vehicle and trailer taxes—Indian-owned vehicles.*—Washington's motor vehicle and mobile home, camper, and trailer taxes—assessed for privilege of using such vehicles in State—cannot properly be imposed upon vehicles owned by Indian tribes or their members and used both on and off reservations. Washington v. Confederated Tribes, p. 134.

2. *State cigarette and sales taxes—Stamp and recordkeeping requirements—Indian reservations.*—Washington's imposition of its cigarette and sales taxes on on-reservation sales by Indian retailers to non-Indians, its requirement that tribal smokeshops affix tax stamps to cigarette packages before sales to non-Indians, and its imposition of recordkeeping requirements on tribes as to tax-exempt sales are valid even though tribes have power to also impose cigarette taxes on nontribal purchases, and State's tax-enforcement interest is sufficient to justify its seizure of unstamped cigarettes as contraband. Washington v. Confederated Tribes, p. 134.

TENTH AMENDMENT. See **Civil Rights Act of 1964, 1.**

TERMINATION OF GOVERNMENT ASSISTANCE TO NURSING HOMES. See **Constitutional Law, III, 4.**

TERRITORIAL SEA. See **Submerged Lands Act.**

TIBURON, CAL. See **Constitutional Law, IV.**

TIMELINESS OF APPEALS. See **Taxes, 2.**

TIMELINESS OF FILING CLAIM WITH EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1964, 2.**

TIME, PLACE, OR MANNER RESTRICTIONS ON FREE SPEECH. See **Constitutional Law, VI, 2.**

TITLE INSURANCE. See **National Labor Relations Act, 2.**

TRAFFIC OFFENSES. See **Constitutional Law, II.**

TRIBAL SELF-GOVERNMENT. See **Taxes.**

TRUST COMPANIES. See **Constitutional Law, I, 1.**

UNEMPLOYMENT BENEFITS UNDER COLLECTIVE-BARGAINING AGREEMENTS. See **Vietnam Era Veterans' Readjustment Assistance Act of 1974.**

UNFAIR LABOR PRACTICES. See **National Labor Relations Act.**

UNIONS. See **National Labor Relations Act.**

UNITED STATES MAGISTRATES. See **Federal Magistrates Act.**

UNLAWFUL EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964.**

UNSEAWORTHINESS. See **Longshoremen's and Harbor Workers' Compensation Act.**

VETERANS. See **Vietnam Era Veterans' Readjustment Assistance Act of 1974.**

VEXATIOUS PROLONGING OF LITIGATION. See **Attorney's Fees.**

VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT OF 1974.

Reinstatement to former job—Seniority rights—Unemployment benefits.—Supplemental unemployment benefits under a certain steel industry collective-bargaining agreement are perquisites of seniority to which a veteran returning to his former job is entitled under Act's provisions as to reinstatement "without loss of seniority," and he is to be considered as returning to seniority escalator at precise point he would have occupied had he kept his position with his employer continuously during period of military service. Coffy v. Republic Steel Corp., p. 191.

VOLUNTARINESS OF ACCUSED'S STATEMENTS. See **Federal Magistrates Act.**

WAIVER OF RIGHT TO COUNSEL. See **Constitutional Law, VIII.**

WARRANTLESS SEARCHES AND SEIZURES. See **Constitutional Law**, X.

WASHINGTON. See **Indians**; **Taxes.**

WATERS. See **Boulder Canyon Project Act**; **Submerged Lands Act.**

WISCONSIN. See **Constitutional Law**, III, 2.

WITNESSES. See **Constitutional Law**, III, 1, 5; VII.

WORDS AND PHRASES.

1. *"Any action or proceeding."* § 706 (k), Civil Rights Act of 1964, 42 U. S. C. § 2000e–5 (k). New York Gaslight Club, Inc. v. Carey, p. 54.

2. *"Any . . . manufacture, or composition of matter."* 35 U. S. C. § 101. Diamond v. Chakrabarty, p. 303.

3. *"Costs."* 28 U. S. C. § 1927. Roadway Express, Inc. v. Piper, p. 752.

4. *"De novo determination."* Federal Magistrates Act, 28 U. S. C. § 636 (b)(1). United States v. Raddatz, p. 667.

5. *"Filed."* §§ 706 (c), (e), Civil Rights Act of 1964, 42 U. S. C. §§ 2000e–5 (c), (e). Mohasco Corp. v. Silver, p. 807.

6. *"Imprisonment or fine or both."* § 406, Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 846. Bifulco v. United States, p. 381.

7. *"Present perfected rights."* § 6, Boulder Canyon Project Act, 43 U. S. C. § 617e. Bryant v. Yellen, p. 352.

8. *"Public disclosure of any information."* § 6 (b)(1), Consumer Product Safety Act, 15 U. S. C. § 2055 (b)(1). Consumer Product Safety Comm'n v. GTE Sylvania, Inc., p. 102.

9. *"Statute."* 28 U. S. C. § 1257 (2). PruneYard Shopping Center v. Robins, p. 74.

10. *"Without loss of seniority."* Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U. S. C. § 2021 (b)(1). Coffy v. Republic Steel Corp., p. 191.

WORKERS' COMPENSATION. See **Longshoremen's and Harbor Workers' Compensation Act.**

"WORK IN CONTROVERSY" IN LABOR DISPUTE. See **National Labor Relations Act**, 1.

WORK PRESERVATION AGREEMENTS. See **National Labor Relations Act**, 1.

ZONING. See **Constitutional Law**, IV.